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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 93

[Docket No. 03–081–2]

Tuberculosis in Cattle; Import Requirements

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule; withdrawal.

SUMMARY: This document withdraws the interim rule amending the animal importation regulations to require that steers and spayed heifers with any evidence of horn growth that are entering the United States meet the same tuberculosis testing requirements as sexually intact animals entering the United States. That interim rule was published in the **Federal Register** on July 20, 2004, and was scheduled to become effective on August 19, 2004. We have decided to publish a proposed rule in place of the interim rule. The proposed rule will be published in the **Federal Register** in the near future.

DATES: This withdrawal is effective August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Dr. Terry Beals, National Tuberculosis Program Coordinator, Eradication and Surveillance Team, National Center for Animal Health Programs, VS, APHIS, 4020 N. Lincoln Blvd., Suite 101, Oklahoma City, OK 73105; (405) 427–2998.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR part 93 prohibit or restrict the importation of certain animals, birds, and poultry into the United States to prevent the introduction of communicable diseases of livestock and poultry. Subpart D of part 93 (§§ 93.400 through 93.435, referred to below as the regulations) governs the importation of ruminants. Section 93.406 of the regulations contains requirements for diagnostic tests for brucellosis and tuberculosis. Section 93.427 contains some additional safeguards against tick-borne diseases, brucellosis, and tuberculosis for cattle imported into the United States from Mexico.

On July 20, 2004 (69 FR 43283–43285, Docket No. 03–081–1), APHIS published in the **Federal Register** an interim rule amending §§ 93.406 and 93.427 to require that steers and spayed heifers with any evidence of horn growth that are entering the United States meet the same tuberculosis testing requirements as sexually intact animals entering the United States. The interim rule was scheduled to become effective on August 19, 2004.

We have decided to publish a proposed rule in place of the interim rule. Therefore, we are withdrawing the interim rule and will publish the proposed rule in the **Federal Register** in the near future.

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 4th day of August 2004.

W. Ron DeHaven,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–18446 Filed 8–11–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 4

[Docket No. 040730221–4221–01]

RIN 0605–AA18

Disclosure of Government Information

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: This document amends the Department of Commerce's (Department) Freedom of Information Act (FOIA) regulations by adding a facsimile (fax) number and an e-mail address as methods of transmitting appeals of initial responses to FOIA requests to the Office of General Counsel. The e-mail address is designed specifically to receive FOIA appeals. This amendment will ensure a more uniform and controlled method for the receipt and tracking of FOIA appeals, as well as assist the Office of General Counsel in providing accurate and timely responses.

DATES: Effective August 12, 2004.

ADDRESSES: The public may submit written FOIA appeals to the Department to the following address: U.S. Department of Commerce, Office of General Counsel, Room 5875, 14th and Constitution Avenue, NW., Washington, DC 20230, or to the following e-mail address, *FOIAAppeals@doc.gov*, or fax number, 202–482–2552.

FOR FURTHER INFORMATION CONTACT: Brian D. DiGiacomo, 202–482–5391.

SUPPLEMENTARY INFORMATION: Section 4.10(a) of the Department of Commerce's regulations implementing the Freedom of Information Act (5 U.S.C. 552) states that if a request for records is initially denied in whole or in part, or has not been timely determined, or if the requester receives an adverse initial determination regarding any other matter under this subpart, the requester may file a written appeal, which must be received by the Office of General Counsel within 30 calendar days of the date of the written denial or, if there has been no determination, may be submitted anytime after the due date. 15 CFR 4.10(a). In order to create a more direct way to receive FOIA appeals, the Office of General Counsel has created a new e-mail address and has made available a fax number. The address is *FOIAAppeals@doc.gov*. The fax number is 202–482–2552. When an appeal is submitted via fax or e-mail, it must include a copy of the initial FOIA request and a copy of the initial denial letter as attachments to the fax or e-mail. The submission will not be considered complete without these attachments. Written appeals submitted by mail will still be accepted. Requesters may begin using the fax number and new e-mail address as of August 12, 2004. Please be aware that the e-mail, fax machine and Office of the General Counsel are monitored only during normal business hours (8:30 a.m. to 5 p.m., eastern time, Monday through Friday). FOIA appeals posted to the e-mail box, fax machine or Office of the General Counsel after

normal business hours will be deemed received on the next normal business day.

Classification

Executive Order 12866: This rule has been determined to be not significant for purposes of EO 12866.

Administrative Procedure Act: The Department finds under 5 U.S.C. 553(b)(B) that good cause exists to waive prior notice and opportunity for public comment. This final rule amends the Department's FOIA regulations to allow the public to file written appeals with the Office of General Counsel via fax or e-mail. By accepting fax and e-mail transmissions, the Department merely establishes additional means for the public to submit FOIA appeals to the Office of General Counsel. The right to and the requirements of filing such an appeal are unchanged by this rule. Because this amendment is not a substantive change to the regulations, it is unnecessary to provide prior notice and opportunity for public comment. Further, pursuant to 5 U.S.C. 553(b)(A), this rule of agency organization, procedure and practice is not subject to the requirement to provide prior notice and opportunity for public comment. The Department also finds that the 30-day delay in effectiveness required under 5 U.S.C. 553(d) is inapplicable because this rule is not a substantive rule. This final rule merely establishes additional means for the public to submit FOIA appeals to the Office of General Counsel. Because this amendment is not a substantive change to the regulations, the 30-day delay in effectiveness does not apply.

Regulatory Flexibility Act: Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

List of Subjects in 15 CFR Part 4

Administrative practice and procedure, Classified information.

■ For the reasons stated in the preamble, the Department of Commerce amends 15 CFR part 4 as set forth below:

PART 4—DISCLOSURE OF GOVERNMENT INFORMATION

■ 1. The authority citation for part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.S.C. 553; 31 U.S.C. 3717; 44 U.S.C. 3101; Reorganization Plan No. 5 of 1950.

■ 2. Amend § 4.10 by revising paragraphs (a) and (b) to read as follows:

§ 4.10 Appeals from initial determinations or untimely delays.

(a) If a request for records is initially denied in whole or in part, or has not been timely determined, or if a requester receives an adverse initial determination regarding any other matter under this subpart (as described in § 4.7(b)), the requester may file a written appeal or an electronic appeal, which must be received by the Office of General Counsel during normal business hours (8:30 a.m. to 5 p.m., Eastern Time, Monday through Friday) within thirty calendar days of the date of the written denial or, if there has been no determination, may be submitted anytime after the due date, including the last extension under § 4.6(c), of the determination. Written or electronic appeals arriving after normal business hours will be deemed received on the next normal business day.

(b) Appeals shall be decided by the Assistant General Counsel for Administration (AGC-Admin), except that appeals for records which were initially denied by the AGC-Admin shall be decided by the General Counsel. Written appeals should be addressed to the AGC-Admin, or the General Counsel if the records were initially denied by the AGC-Admin. The address of both is: U.S. Department of Commerce, Office of General Counsel, Room 5875, 14th and Constitution Avenue NW., Washington, DC 20230. An appeal may also be sent via facsimile at 202–482–2552. For a written appeal, both the letter and the appeal envelope should be clearly marked "Freedom of Information Appeal". The address for electronic appeals is *FOIAAppeals@doc.gov*. The appeal (written or electronic) must include a copy of the original request and the initial denial, if any, and a statement of the reasons why the records requested should be made available and why the initial denial, if any, was in error. No opportunity for personal appearance, oral argument or hearing on appeal is provided.

* * * * *

Dated: August 6, 2004.

Brenda Dolan,

Departmental Freedom of Information Officer.

[FR Doc. 04–18412 Filed 8–11–04; 8:45 am]

BILLING CODE 3510–17–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038 — AB64

Minimum Financial and Related Reporting Requirements for Futures Commission Merchants and Introducing Brokers

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is amending several of its regulations relating to the minimum financial and related reporting requirements for futures commission merchants ("FCMs") and introducing brokers ("IBs"). The amended regulations require an FCM, when calculating its minimum adjusted net capital requirement, to include a computation based on the risk maintenance margin levels of positions carried in customer and noncustomer accounts. The required calculation is identical to capital calculations that each FCM currently is required to perform pursuant to the rules of self-regulatory organizations, including one derivatives clearing organization. The Commission also is adopting conforming margin-based computations for purposes of the Commission's equity capital, subordination agreement and "early warning" requirements for FCMs. The margin-based computations required by the final rule replace computations in the Commission's regulations that had been based on the amount of funds held by an FCM to margin, guarantee, or secure futures and option positions carried on behalf of customers. Furthermore, the Commission is amending its regulations to reduce the time periods for FCMs and IBs to report events specified in the Commission's early warning requirements. Finally, the Commission also is adopting amendments to streamline the financial statement reporting requirements for FCMs and IBs.

DATES: *Effective Date:* September 30, 2004.

FOR FURTHER INFORMATION CONTACT: Thomas J. Smith, Associate Deputy Director and Chief Accountant, at (202) 418–5495, or Thelma Diaz, Special Counsel, at (202) 418–5137, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC

20581. Electronic mail: (*tsmith@cftc.gov*) or (*tdiaz@cftc.gov*).

SUPPLEMENTARY INFORMATION:

I. Summary of Rule Amendments as Proposed by the Commission

Section 4f(b) of the Commodity Exchange Act (the "Act") authorizes the Commission, by regulation, to impose minimum financial and related reporting requirements on FCMs and IBs.[1] On July 9, 2003, the Commission issued a release proposing amendments to Commission Rules 1.10, 1.12, 1.16, 1.17, and 1.18, which set forth certain minimum financial and related reporting requirements for FCMs and IBs (the "Proposing Release").[2] The key element of the Proposing Release was a proposal to amend Rule 1.17(a) to require margin-based, also referred to as "risk-based," capital computations for an FCM's calculation of its minimum adjusted net capital requirement. The Proposing Release also included conforming amendments to other paragraphs of Rule 1.17 that set forth capital computations that FCMs must perform for purposes related to their equity capital and subordination agreements, and to capital computations in Rule 1.12 that FCMs must make to comply with the Commission's "early warning" requirements. Other rule amendments in the Proposing Release proposed to shorten the time periods specified in Commission rules for FCMs and IBs to report certain financial events to the Commission, and to reduce the time periods before which an FCM is required to take a capital charge for outstanding margin calls on its customer and noncustomer accounts. Lastly, the Proposing Release included proposed revisions of Rules 1.10, 1.16 and 1.18 in order to amend the requirements for the financial statements that FCMs and IBs must file with the Commission.

The Commission received ten letters in response to its request for comments on the proposed rule amendments in the Proposing Release.[3] Of these ten comments, five were from individual firms registered as FCMs,[4] and two were from industry trade associations, the National Introducing Brokers Association ("NIBA") and the Futures Industry Association ("FIA"). The National Futures Association ("NFA"),[5] the Joint Audit Committee ("JAC"),[6] and a former Commission staff member also submitted comment letters.[7] These comments are discussed in more detail later in this supplementary information section.

The Commission, after further consideration, including consideration of the comments, has determined to adopt the following: (1) A requirement that an FCM include, as part of the calculation of its minimum adjusted net capital requirement, a computation based on the maintenance margin levels of the positions or transactions carried by the FCM in customer and noncustomer accounts, including futures, option on futures, and other transactions that the Commission has, by order or otherwise, approved for carrying in customer segregated accounts in accordance with section 4d of the Act or that are carried by the FCM in noncustomer accounts; [8] (2) a conforming capital computation for early warning purposes, but which has been modified from the version proposed in the Proposing Release; and (3) other capital computations for purposes of an FCM's subordination agreements and equity capital, which have also been modified, as specified herein, from the versions that were originally proposed. Further, the Commission has determined to adopt amendments relating to the financial reporting requirements of FCMs and IBs as proposed in the Proposing Release.

Each of the rule amendments that the Commission has determined to adopt is discussed more fully in Parts II through VI of this supplementary information section, first by summarizing the background of the proposed rule amendment, then by summarizing the comments received in response, and finally by specifying the modifications, if any, that have been made to the final rule as adopted after consideration of the comments received.[9] The Commission also encourages interested persons to read the detailed analysis in the Proposing Release for each of the proposed rule amendments. Citations to the pertinent pages of the Proposing Release have been included as part of the discussion in this final rulemaking release of the amendments being adopted by the Commission.

As discussed in the Proposing Release, Rule 1.10 requires FCMs to prepare Forms 1–FR–FCM to file financial information with the Commission and their designated self-regulatory organization. The Commission advised in the Proposing Release that it would make conforming amendments to the Form 1–FR–FCM to reflect risk-based capital and changes to the early warning reporting requirements, if adopted by the Commission.[10] The Commission has approved such conforming amendments to the Form 1–FR–FCM, and the revised form is available to FCMs upon request from the Commission.[11]

Rule 1.10(d)(1) provides that each Form 1–FR–FCM, which is not required to be certified by an independent public accountant, must be completed in accordance with the instructions to the Form. The Commission issued a Form 1–FR–FCM Instruction Manual in 1989, and the Manual has not been revised since it was issued. Accordingly, the Commission has approved proposed changes to the 1–FR–FCM Instruction Manual to conform the Manual to rule amendments adopted in this final rulemaking. The Instruction Manual is available electronically on the Commission's Web site and hard copies may be obtained by contacting the Commission.[12]

II. Risk-Based Capital Requirements

The Commission's capital requirement for FCMs is set forth in Rule 1.17(a)(1)(i)(A)–(D), which, prior to the amendments adopted by this rulemaking, required an FCM to maintain minimum adjusted net capital

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[1] The Act is codified at 7 U.S.C. 1 *et seq.* (2003), and section 4f(b) of the Act is codified at 7 U.S.C. 6f(b). The Commission's rules cited in this final rulemaking may be found at 17 CFR Ch. 1 (2003).

[2] 68 FR 40835 (July 9, 2003). The Proposing Release may be accessed electronically through the Commission's Web site *http://www.cftc.gov/*.

[3] The comment letters are available for inspection and copying at the Commission's Washington office in its public reading room, Room 4072, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. The telephone number for the public reading room is (202) 418–5025. The comment letters also are available on the Commission's public Web site at *http://www.cftc.gov/foia/comment03/foi03—009_1.htm*.

[4] Comment letters were filed by Cargill Investor Services, Inc.; Fimat USA, Inc.; Man Financial Inc.; R.J. O'Brien & Associates, Inc.; and Carr Futures Inc.

[5] NFA is a registered futures association pursuant to section 17 of the Act.

[6] The JAC is a committee formed by futures exchanges and other self-regulatory organizations to coordinate audit and financial surveillance activities of FCMs.

[7] Paul H. Bjarnason, Jr. filed a comment letter.

[8] The Proposing Release explained that the term "noncustomer" is defined by Rule 1.17(b)(4) and generally refers to an entity affiliated with an FCM, including certain employees and officers of an FCM. 68 FR at 40838.

[9] Part V summarizes the Commission's determination to not adopt as part of this final rulemaking the proposed amendments to reduce the time periods before which an FCM is required, pursuant to Rule 1.17(c)(5), to take a capital charge for outstanding margin calls on its customer and noncustomer accounts.

[10] 68 FR at 40838, fn. 13. *See* 60 FR at 40840 — 40842.

[11] Requests for the form should be addressed to the Commission's Office of the Secretariat, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

[12] Requests for the Form 1–FR–FCM Instruction Manual should be addressed to the Commission's Office of the Secretariat, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

equal to, or in excess of, the greatest of the following:

a. $250,000;

b. Four percent of an amount, hereinafter to referred as the "Segregated Amount," that equals the total of the funds required to be segregated for customers trading on U.S. commodity markets pursuant to section 4d(a)(2) of the Act, including the funds of customers trading on registered derivatives transaction execution facilities that have elected to opt-out of segregation pursuant to Rule 1.68, and the funds required to be secured for customers trading on foreign commodity markets pursuant to Rule 30.7, less the market value of options purchased by customers for which the full premiums have been paid;

c. The amount of adjusted net capital required by a registered futures association (NFA presently being the only such association) of which the FCM is a member; or

d. For FCMs that also are registered with the U.S. Securities and Exchange Commission ("SEC") as securities brokers or dealers, the amount of net capital required by SEC Rule 15c3–1(a).[13]

In the Proposing Release, the Commission noted various limitations in the current net capital rule that could be addressed by requiring capital computations based on the margin levels of customer and noncustomer positions carried by the FCM, in lieu of the capital computation now required to be based on the Segregated Amount. For example, a primary limitation of the Segregated Amount is that it does not include noncustomer positions and therefore does not fully reflect the extent to which an FCM is financially exposed to commodity positions that it carries for both customers and noncustomers.[14] The Commission accordingly proposed amendments to Rule 1.17(a)(1)(i)(B) that would delete the computation that is based upon the Segregated Amount, and would require in its place a computation based on the aggregate of: (i) Eight percent of the "risk margin" requirement on futures and option on futures positions carried in customer accounts; and (ii) four percent of the "risk margin" requirement on futures and option on futures positions carried in noncustomer accounts.[15] As noted in the Proposing Release, in proposing this requirement the Commission was intending to frame a margin-based capital computation that would be identical to the margin-based minimum net capital computation that several futures self-regulatory organizations, including one derivatives clearing organization, have adopted for determining the risk-based capital requirements of their respective member-FCMs.[16]

For purposes of the proposed risk-based minimum adjusted net capital requirement, the Commission proposed new or amended definitions in Rule 1.17(b) for the terms "customer account," "noncustomer account," and "risk margin requirement."[17] In general, the term "customer account" would be defined by Rule 1.17(b)(7) to include the account of any customer as defined by Rule 1.17(b)(2), which includes customers as defined by Rule 1.3(k), option customers as defined by Rules 1.3(jj) and 32.1(c), and foreign futures and foreign option customers as defined by Rule 30.1(c), and also would include the accounts of foreign-domiciled customers trading on foreign boards of trade. The term "noncustomer account" would continue to be defined by Rule 1.17(b)(4) as an account that is not included in the definition of either customer (Rule 1.17(b)(2)) or proprietary account (Rule 1.17(b)(3)), and also would include noncustomer accounts for foreign-domiciled persons trading on foreign boards of trade. The term "risk margin" requirement for an account would be defined by a new Rule 1.17(b)(8), which in the Proposing Release was defined to mean the level of maintenance margin, or performance bond, that the exchange[18] on which a position or portfolio of futures contracts and/or options on futures contracts is traded requires its members to collect from the owner of the account, subject to several additional requirements.

Upon further review, the Commission has determined that the definition proposed for Rule 1.17(b)(8) does not adequately encompass all of the margin or performance bond that FCMs, in accordance with the requirements of the futures organizations to which they belong, currently include in their margin-based capital computations. By limiting the computation to "futures contracts and options on futures contracts", the proposed rule might have been interpreted to exclude non-futures positions or transactions that the Commission has authorized to be held in customer accounts pursuant to section 4d of the Act, or the non-futures positions or transactions that an FCM elects to hold in noncustomer accounts. For example, options on securities that are held in commodity customer accounts pursuant to section 4d of the Act under the terms and conditions of Commission approved cross-margining programs are included in FCMs' risk-based margin calculations under the current rules of self-regulatory organizations. In addition, over-the-counter contracts and options that FCMs hold in section 4d customer accounts pursuant to Commission orders also are currently included in the FCMs' risk-based capital computations. Furthermore, by limiting the computation to margin required "by the exchange on which a position or portfolio of futures contracts and/or options on futures contracts is traded", the proposed rule does not reflect the growing diversity in the types of positions that FCMs may be able to carry for customers and noncustomers, including positions that are not traded on a DCM or DTEF, but are cleared by a derivatives clearing organization.[19]

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[13] The SEC rules cited in this release may be found at 17 CFR Ch. 2 (2003).

[14] The Commission discussed in detail other limitations to the capital rule based upon the Segregated Amount in the Proposing Release. 68 FR at 40837–40.

[15] As discussed in the Proposing Release, U.S. commodity exchanges and numerous foreign commodity exchanges use the Standard Portfolio Analysis of Risk ("SPAN") margining system for calculating margin requirements on a portfolio of futures and option positions. The SPAN maintenance margin level consists of a "risk" component and an "equity" component. The risk component covers potential future losses in the portfolio value. Such losses include a market move against a futures position or a short (written) option. The equity component (option premium, marked-to-the market daily) reflects the asset represented by long option positions or the liability represented by short (written) option positions in the portfolio. *Id.*

[16] As of January 1, 1998, the Clearing Corporation (formerly the Board of Trade Clearing Corporation), the Chicago Board of Trade, and the Chicago Mercantile Exchange have all adopted margin-based minimum capital requirements for their respective clearing member firms. The NFA adopted similar risk-based minimum capital requirements for its member FCMs effective October 31, 2000. All of these organizations use the same percentages of risk maintenance margin that the Commission has proposed for its amended net capital rule. 68 FR at 40837–8.

[17] 68 FR at 40847–8.

[18] The applicable exchange rules would include those of foreign exchanges and those of designated contract markets ("DCMs") and derivatives transaction execution facilities ("DTEFs") governed by the Act. Also, the proposed definition of "customer account" in Rule 1.17(b)(7) would extend to FCM customers trading on DTEFs. Such customers are included in the definition of customer in Rule 1.3(k), which is incorporated by reference in Rule 1.17(b)(2), and all customers included within Rule 1.17(b)(2) are also included in the definition set forth in Rule 1.17(b)(7).

[19] In particular, clearing members of the New York Mercantile Exchange ("NYMEX") currently maintain accounts for customers clearing products that are listed, but not traded, on the NYMEX exchange. The margin requirements for such products are established by NYMEX as a derivatives clearing organization. *See* Commission order dated February 2, 2004, supplementing the Commission's prior order dated May 30, 2002. A copy of the order is available on the Commission's Web site at *http://www.cftc.gov/files/tmi/tmnymexotcorder021004.pdf.*

Accordingly, the Commission has determined to modify the definition it originally proposed to set forth in Rule 1.17(b)(8) for the risk margin requirement for an account. As modified, an account's risk margin requirement would mean the level of maintenance margin, or performance bond, that the FCM is required under the rules of an exchange (or by a clearing organization if the required margin level is established not by an exchange but rather by a clearing organization) to collect from the owner of a customer account or noncustomer account for all positions, whether futures positions or non-futures positions, held in such accounts.[20] This definition would be subject to several additional requirements, which also were included in the definition originally described in the Proposing Release. First, the definition of risk margin would not include the equity component of short or long option positions maintained in an account. Second, the maintenance margin or performance bond requirement associated with a long option position may be excluded from risk margin to the extent that the value of such long option position does not reduce the total risk maintenance or performance bond requirement of the account that holds the long option position.[21] Third, the risk margin for an account carried by a futures commission merchant which is not a member of the exchange or the clearing organization that requires collection of such margin should be calculated as if the futures commission merchant were such a member. Finally, if an FCM does not possess sufficient information to determine what portion of an account's total margin requirement represents risk margin, the proposed definition would require that the FCM treat as risk margin all of the margin required by the exchange, clearing organization, or other FCM or entity for that account. For example, if customer or noncustomer positions are executed on a foreign board of trade and the FCM does not possess sufficient information to determine what portion of the foreign board of trade's required margin is risk margin as defined under Rule 1.17(b)(8), the FCM is required to include the entire margin requirement in its risk-based capital computation.

The commenters overwhelmingly endorsed the Commission's proposal to eliminate the capital computation based upon the Segregated Amount, and supported the application of minimum adjusted net capital requirements based upon risk maintenance margin. The commenters also did not object to any of the definitions proposed by the Commission to implement risk-based capital requirements. However, FIA and two individual commenters endorsed conducting further analysis of the margin-based capital requirements of the NFA and other self-regulatory organizations, with which the Commission rule, as amended, will now be consistent, for the purpose of identifying possible enhancements that might be made to the Commission's rules.[22] FIA offered to undertake such an analysis, in coordination with the self-regulatory organizations, and with the participation of the Commission expressly welcomed.

FIA offered a recommendation that it believed might accelerate the adoption of any changes that received the endorsement of the participants in the proposed analysis. Under FIA's proposal, Rule 1.17(a) would be amended to delete the current capital computation based on the Segregated Amount, but no additional amendments would be made to Rule 1.17(a) to specify a risk-based capital computation. FIA suggested, and NFA agreed, that any recommendations resulting from the proposed review of margin-based capital requirements could be put into effect by NFA's amendment of its rules, because NFA's risk-based capital requirements apply to all FCMs.

The Commission welcomes and encourages the commitment of industry resources towards an active and continuous evaluation of the capital requirements set forth in the Commission's rules. The Commission believes that the analysis proposed in FIA's letter is neither precluded by, nor inconsistent with, the Commission's immediate adoption of the proposed risk-based capital requirements for FCMs. Any proposals for further amendment to these risk-based capital rules would be evaluated by the Commission in light of all the Act's financial safeguards for monitoring the financial integrity of futures intermediaries, and the Commission can thereafter publish for public comment in the **Federal Register** such amendments as it proposes to adopt.

The Commission has considered the comments received and is adopting as final the amendments to Rule 1.17(a) and (b) as set forth in the Proposing Release, with the modification discussed earlier to the definition of risk margin in Rule 1.17(b)(8). As amended, Rule 1.17(a)(1)(i)(B) will no longer be based upon the Segregated Amount, but will instead include the following capital computation: Eight percent of the total risk margin requirement for all positions carried by the FCM in customer accounts, plus four percent of the total risk margin requirement for all positions carried by the FCM in noncustomer accounts. As discussed earlier, the definition of the risk margin requirement for an account is set forth in a new Rule 1.17(b)(8), and is determined generally by subtracting from the maintenance margin that the rules of an exchange or clearinghouse requires an FCM to collect from the owner of a customer or noncustomer account: (i) The equity component of each position; and (ii) the maintenance margin for each long option position that is not held to hedge other positions in the account. However, as noted in the Proposing Release, the Commission understands that calculating the maintenance margin on specific long option positions in a portfolio may require a certain amount of manual processing under current back office operating procedures, which some

[20] For some limited classes of customer accounts, primarily those of non-clearing exchange members trading for their own accounts only, the rules of three DCMs permit member FCMs to refrain from collecting the exchange-established maintenance margin levels otherwise required by such rules for positions held in customer accounts and noncustomer accounts. All of the organizations that have adopted risk-based capital rules for FCMs (the NFA, a derivatives clearing organization and two DCMs, as identified in footnote 16) require their member FCMs to disregard such exceptions when computing their minimum net capital requirements. The Commission intends Rule 1.17, as adopted herein, to impose the same requirement. FCMs must therefore include in their adjusted net capital requirements the exchange-established maintenance margin levels for all positions in the accounts held by the FCM for its customers and noncustomers.

It should also be noted that such rules may permit the exchange or clearinghouse to increase margin requirements to reflect circumstances other than changes in SPAN measurements. For example, an exchange may require an FCM to collect more than the standard margin from a specific customer due to credit or other concerns. The definition of risk margin, both as originally proposed and herein adopted, would include such margin.

[21] There is generally no risk to the FCM associated with a long option position, because the maximum potential loss is the full option premium, which is paid by the customer in full at the inception of the transaction. However, because long option positions that hedge other futures and option positions in a portfolio will reduce the total margin requirement of the portfolio, SPAN includes a risk maintenance margin component to protect against a decline in the market value of such long option positions. The Proposing Release proposed to allow FCMs to deduct from their risk margin requirements the maintenance margin for long option positions that are not hedging other futures or option positions. 68 FR at 40838.

[22] For example, FIA suggested examining such rules to determine whether they reflected advances in risk management made since 1998. An FCM also proposed that the Commission's rule should grant a credit of 25 percent for each dollar of margin that an FCM carries in excess of that required by the exchange, and Mr. Bjarnason identified other possible modifications for the Commission to consider.

FCMs may wish to forego because it would not materially reduce their risk-based minimum capital requirement.[23] Accordingly, the amended rule permits, but does not require, an FCM to exclude the risk maintenance margin for long options that do not hedge other positions maintained in the account.

The amended rule further provides that if the risk margin associated with cleared positions cannot be determined by the FCM, the firm will be required to apply the specified percentages for customer and noncustomer accounts to the total margin required by the exchange, clearing organization, other futures commission merchant or entity for the customer and noncustomer positions carried. In addition, as noted in the Proposing Release, the new margin-based capital computations will not apply to proprietary (*i.e.*, firm-owned) accounts. Rule 1.17(c)(5)(x) currently includes proprietary positions in the calculation of adjusted net capital to the extent that uncovered proprietary positions (*i.e.*, positions that are not hedged by cash market transactions) result in a charge or "haircut" to the firm's net capital based on clearinghouse or exchange margin requirements.[24]

III. Early Warning Requirements Under Rule 1.12

Pursuant to Commission Rule 1.12, an FCM or IB must comply with several requirements upon the occurrence of predefined events that may raise concerns regarding the firm's ability to meet its obligations to the market, safeguard customer funds, or otherwise continue normal business operations. The requirements in Rule 1.12, which include notices that the FCM or IB must file with the Commission and the firm's designated self-regulatory organization ("DSRO"),[25] enhance the ability of the Commission and the DSRO to respond with a heightened degree of surveillance, as may be necessary or prudent, in light of the possibility of deteriorating operating or financial conditions at a firm. The requirements in Rule 1.12 are therefore generally referred to as "early warning" requirements.

Paragraph (b) of Rule 1.12 currently provides that if an FCM maintains adjusted net capital that is equal to or in excess of the minimum adjusted net capital required by Rule 1.17(a)(1)(i), but below a specified level that is greater than the FCMs' required minimum (to be referred to hereafter as the "early warning capital level"), then the FCM is required to meet specified notice requirements and to file with the Commission and the firm's DSRO monthly unaudited financial statements. The early warning capital level required under Rule 1.12(b) equals the greatest of the following:

a. $375,000;

b. Six percent of the Segregated Amount;

c. 150 percent of the amount of adjusted net capital required by a registered futures association (*i.e.*, NFA) of which the FCM is a member; or

d. For FCMs that also are registered with the SEC as securities brokers or dealers, the amount of net capital required by SEC Rule 17a–11(b).

Paragraph (c) of Rule 1.12 currently requires an FCM or IB to provide same day notice to the Commission and its DSRO of any failure to make or keep current the books and records that are required by the Commission's regulations, and the firm also must file within five business days after giving such notice a written report that describes what steps have been and are being taken to correct the situation. Paragraph (d) of Rule 1.12 requires an FCM or IB to provide notice, within three business days, to the Commission and its DSRO if the firm discovers or is notified by its independent public accountant of the existence of any material inadequacy in the internal controls of the firm. Within five business days after providing the required notice, the FCM or IB also must file a written report stating what steps have been and are being taken to correct the material inadequacy in its internal controls.

A. Early Warning Capital Levels for FCMs

The amendment proposed for Rule 1.12(b) would replace the early warning capital level computation that is based on six percent of the Segregated Amount held by an FCM with a computation based upon 150 percent of an FCM's minimum adjusted net capital requirement, as determined by the margin-based capital requirements in Rule 1.17(a)(1)(i)(B), as amended. The Commission also proposed to amend Rule 1.12(b) to require that any FCM that did not meet or exceed its early warning capital level (whether based on the margin-based capital computation or one of the other computations set forth in Rule 1.17(a)(1)(i)) to submit written notice within 24 hours, instead of the five business days presently allowed under the Commission's rule. Moreover, the Commission proposed to delete the requirement in Rule 1.12(b) for monthly unaudited financial statements from an FCM that had failed to meet its early warning capital level, because this provision would become moot upon the Commission's adoption of a proposed amendment to Rule 1.10, discussed below, that would require *all* FCMs to file unaudited financial statements on a monthly basis, instead of on a quarterly basis as is currently required under Rule 1.10.[26]

The Proposing Release noted a recommendation from the JAC that the Commission eliminate from Rule 1.12 not only the monthly filing requirement, but also the requirement that an FCM failing to meet or exceed its early warning capital level provide notice to the Commission and its DSRO. The Commission, however, expressed concern that eliminating the notice requirement could diminish the Commission's and the DSRO's ability to react promptly to potential financial crises at an FCM. To assist the Commission with its analysis of this issue, the Commission invited comment from interested parties on whether the proposed 150 percent early warning capital level would be appropriate under a risk-based capital rule or whether it should be adjusted or eliminated.

All of the comments received by the Commission recommended against establishing an early warning capital level for margin-based capital requirements. According to FIA, the proposed amendment is unnecessary since risk-based capital requirements encourage FCMs to maintain capital in excess of their required minimums, reflecting the fact that margin-based capital requirements are more sensitive to significant market moves than are capital requirements based on customer segregated funds.[27] FIA further suggested that the proposed amendment is unnecessary because DSROs employ a variety of methods to identify and to

[23] 68 FR at 40838.

[24] 68 FR at 40837–8.

[25] The Commission explained in the Proposing Release that a DSRO is the self-regulatory organization that, pursuant to Commission Rule 1.52, is primarily responsible for monitoring an FCM's compliance with minimum financial and related reporting requirements, receiving and reviewing an FCM's financial reports, and auditing the FCM's books and records. 68 FR at 40840, fn. 17.

[26] 68 FR at 40842. The Proposing Release also included a technical amendment to Rule 1.12(b) to correct the reference to SEC Rule 17a–11(b), which the SEC has redesignated as 17a–11(c). 58 FR 37655 (July 13, 1993.)

[27] When an exchange increases margin requirements to reflect significant market moves, an FCM's margin-based capital requirements will increase as well. FIA asserted that FCMs therefore will maintain some level of excess capital, as a matter of necessity as well as prudent business practice, to enable them to respond to the more immediate effect that significant market moves have on their risk-based capital requirements.

monitor their member FCMs that may be experiencing financial stress. For example, NFA requires each FCM for which it is the DSRO to report a variety of information on a daily basis, including the FCM's SPAN margin calculation, the FCM's segregation requirements and the amount of funds actually held in segregation. FIA stated its belief that information that the exchanges receive on a daily basis, such as clearing house variation margin pay and collect information, along with other reported information that is available to them, provides the exchanges with sufficient data with which to monitor the capital of a member FCM on a daily basis, if necessary.

The JAC stated that the financial surveillance procedures implemented by the exchanges and the NFA should provide sufficient advance notice of a firm's inability to meet its minimum capital requirement. The JAC also noted that Rule 1.12 itself includes other requirements that serve to provide the Commission and self-regulatory organizations with notice of events that could impair the financial viability of an FCM. Such requirements include those set forth in paragraphs (c) and (d) which, as stated above, relate to notice requirements to report deficiencies in the FCM's books and records or internal controls. The JAC further noted that Rule 1.12(g)(1–2) requires an FCM to provide written notice within two business days if any event or series of events cause a 20 percent or more reduction in the FCM's net capital from the amount last reported to the Commission in a financial report, and a minimum of two days advance notice prior to any withdrawal of equity capital or any unsecured advance or loan to any of the designated persons in the rule, if such withdrawal, advance or loan would cause a 30 percent or more net reduction in the FCM's excess adjusted net capital.

Finally, FIA also noted that institutional clients generally insist that their FCMs maintain capital above any applicable early warning capital level, making the early warning capital level an FCM's effective minimum adjusted net capital requirement. Accordingly, FIA and three other commenters stated that many FCMs would be required to maintain amounts of capital well in excess of 150 percent of the minimum adjusted net capital requirement if the early warning capital level were established at 150 percent of margin-based adjusted net capital requirements.

The Commission appreciates the detailed and insightful comments received in response to its proposal to establish an early warning capital level for capital computations that are based on the FCM's margin requirements. As the Commission has previously explained, the requirements in Rule 1.12 "are designed to afford [the Commission] and industry self-regulatory organizations sufficient advance notice of a firm's financial or operational problems to take any protective or remedial action that may be needed to assure the safety of customer funds and the integrity of the marketplace." [28] After considering the comments, the Commission continues to believe that the effective implementation of the financial safeguards of the Act and its regulations requires provisions that establish a period for prompt reporting that a firm's adjusted net capital does not meet or exceed a specified level in excess of the FCM's minimum adjusted net capital requirement. Such provisions enhance the ability of the Commission and DSRO to adjust appropriately the level of monitoring of the FCM's activities when there appears to be circumstances that may detract from the FCM's ability to safeguard customer funds or otherwise satisfy its financial obligations. Moreover, the provisions in other paragraphs of Rule 1.12 cannot alone serve to provide immediate, sufficient notice to the Commission of a material change in a firm's net capital requirements. For example, Rule 1.12(g)(1), which requires notice to the Commission if the amount of the FCM's net capital declines by a specified percentage, does not result in notice to the Commission if the FCM experiences a material increase in its minimum capital requirement, and the FCM does not take appropriate steps to increase its adjusted net capital. Absent Rule 1.12(b), the Commission would not receive notice of the change in such firm's capital position until the increase in the FCM's minimum adjusted net capital requirement had exceeded the amount of adjusted net capital maintained by the FCM.[29]

However, further review of data available from FCM financial reports filed with the Commission does indicate that the Commission's supervisory concerns can be addressed satisfactorily by an early warning capital level that is based on a different threshold percentage of an FCM's margin-based, or risk-based, minimum adjusted net capital requirement. The JAC comment letter objected that, by its analysis, the proposed requirement of 150 percent of a firm's risk-based minimum capital requirement would adversely affect the FCM industry as a whole by resulting in an onerous increase in FCM capital requirements as compared to the Commission's current rule. The JAC therefore proposed that the Commission should consider an alternative that would be lower than 150 percent of an FCM's margin-based minimum adjusted net capital requirement, if the Commission believed it necessary to retain an early warning capital level. The JAC stated that it believed that the adoption of such an alternative could produce an early warning capital level that more closely parallels the current early warning capital level based upon six percent of the Segregated Amount, and would therefore be far less burdensome upon FCMs and customers.

Commission staff has performed its own analysis of the effects of a revised early warning capital level equal to 110 percent of an FCM's minimum adjusted net capital requirement, as determined by the margin-based requirements adopted by this rule. The analysis indicates that the revised level would cause FCMs to remain subject to an obligation to provide notice to the Commission and DSROs in advance of the undercapitalization of the firm, but that the burden of such an obligation for the industry as a whole would be no greater than experienced under the Commission's current regulations. Based on financial data for all 182 FCMs as of May 31, 2004, the analysis indicates that 60 of the 182 FCMs would be subject to a risk-based minimum capital requirement, with the remaining 122 FCMs subject to either the SEC's minimum capital requirement or the Commission's $250,000 minimum. Of the 60 FCMs subject to risk-based capital requirements, the early warning capital level of roughly half would be lower if determined by an amount equal to 110 percent of risk-based capital rather than 6 percent of capital based on segregated funds, and the early warning capital level of the other firms would be higher and, again, in every case the early warning capital requirements, if triggered, would, like the minimum capital requirements, be driven by the particular risk characteristics of the

[28] 63 FR 45711 (August 27, 1998) (final rule adopting amendments to shorten the time periods for filing undercapitalization and undersegregation notices required by Rule 1.12).

[29] The JAC letter included the comment that the Commission might consider, as an alternative to an early warning capital level, modifying Rule 1.12(g)(2) to require notification if an FCM's excess net capital decreases by more than 30 percent due to an increase in its risk-based capital requirement. Unlike the JAC's other proposal, it is difficult to gauge the sufficiency of the notice that would be provided under this proposal, as compared to the requirements of the Commission's existing rule or proposed amended rule.

positions carried by the individual firm in question. Furthermore, all of the firms whose early warning capital level would be greater under the amended rule already hold adjusted net capital in amounts that exceed the revised requirement of 110 percent of their margin-based minimum adjusted net capital requirement. Thus, replacing the existing requirement of 6 percent of the Segregated Amount with the revised early warning capital level requirement would not require any FCM to increase its adjusted net capital in order to comply with the amended rule.

In consideration of the foregoing, the Commission believes that a revised early warning capital level of 110 percent of the FCM's margin-based minimum capital requirement would retain an advance notice requirement that enhances the ability of the Commission and DSROs to monitor effectively the financial condition of FCMs, while still remaining consistent with the goal of aligning an FCM's capital requirements with the risks of its activities. In addition, the Commission is in the process of enhancing its financial surveillance capabilities over firms and market participants through the use of automated systems that will utilize market position data and FCM financial data to assist Commission staff with identifying situations that could adversely impact an FCM's ability to safeguard customer funds and meet its financial obligations to the market. These automated programs will permit Commission staff to conduct stress testing and other scenario testing of the positions held by both market participants and FCMs to gauge the potential impact on such entities based upon the positions they hold. The Commission is therefore amending Rule 1.12(b)(2) to delete the early warning capital level based upon the Segregated Amount, and to set forth in its place an early warning capital level equal to 110 percent of the FCM's margin-based capital requirement as determined by amended Rule 1.17(a)(1)(i)(B).

Adopting the amendment to paragraph (b)(2) of Rule 1.12 also will necessitate a change to paragraph (b)(3) of the rule, which currently sets forth an early warning capital level equal to "150 percent of the amount of adjusted net capital required by a registered futures association of which [a firm] is a member." As noted above, every FCM must comply with the capital requirements of NFA, a registered futures association. Furthermore, as detailed above, NFA's risk-based capital rule includes a risk-based requirement that is identical to the risk-based capital computation being adopted by the Commission.[30] The Commission is therefore amending Rule 1.12(b)(3) to reduce to 110 percent the required percentage of adjusted net capital that is based on a margin-based capital computation set forth in the rules of a registered futures association, if the amount of such margin-based adjusted net capital meets or exceeds the amount computed under the margin-based computation set forth in Rule 1.17(a)(1)(i)(B). This amendment will help ensure that the same percentage of adjusted net capital will be required as early warning capital whenever a margin-based computation in the rules of a registered futures association is the same as the margin-based computation in the Commission's rules.

The Commission also received comments from the FIA and NFA objecting to its proposal to reduce the reporting period set forth in Rule 1.12(b). Currently, Rule 1.12(b) requires that an FCM who "knows or should have known" that its adjusted net capital is below the early warning level to file a written notice "within five (5) business days of such event." With the objective of harmonizing the Commission's rule with the SEC's early warning rule, the Proposing Release included a proposal to amend the phrase five business days to read 24 hours.[31] In response, the NFA and FIA expressed concerns that the amended rule failed to recognize that although FCMs make daily computations of their capital, whenever such computations are made intra-month they are based on estimates only. Moreover, FCMs generally do not complete their daily capital computations until late afternoon, and, given that FCMs conduct business internationally, FIA stated that it would be "impossible to confirm these numbers" within 24 hours from when such daily capital computations are made. FIA and NFA therefore argued that FCMs should be permitted to continue to use established procedures to confirm their estimates and provide notice, if required, within five business days of the original estimated daily capital computation. Moreover, FIA stated that it believed that it would be inappropriate to require early warning notices based on unconfirmed estimates because such early warning notices are publicly available.

The Commission believes that the concerns expressed by these commenters would be addressed by the "know or should have known" standard already set forth in the rule. This same standard applies to other notices required by the Commission's rules, and, with reference to the undersegregation notices required under Rule 1.12(h), the Commission has previously interpreted this standard as follows:

> That part of the standard requiring an FCM to report when it "should know" of a problem may be defined as the point at which a party, in the exercise of reasonable diligence, should become aware of an event.[32]

With respect to the event at issue, *i.e.* adjusted net capital that is less than the required early warning capital level set forth in Rule 1.12(b), but still greater than the minimum required to avoid becoming undercapitalized under Rule 1.12(a), it appears that reasonable diligence on the part of the FCM may include expeditious confirmation of daily, intra-month estimates that have been made in good faith and are otherwise in compliance with Commission regulations. Hence, if confirmation of such estimates were both timely and reasonably necessary, it would be consistent with the amended rule for an FCM to file its required notice within 24 hours of confirmation of such estimates, and compliance with the amended rule would not be impossible under procedures now used by FCMs. The Commission therefore believes it appropriate to amend Rule 1.12(b) as proposed in the Proposing Release, and is hereby amending the rule to require an FCM to file written notice with the Commission and with the FCM's DSRO within 24 hours after it knows or should have known that its adjusted net capital is less than the early warning capital level.

B. Early Warning Requirements: Firm's Books and Records and Internal Controls

Rule 1.12(c) currently requires any FCM or IB that at any time fails to make or keep current books and records required by Commission regulations to be maintained to provide notice on the same day that such event occurs. The notice must specify the books and records that have not been made or are not current, and within five business days after providing such notice the FCM or IB must file a written report

[30] The margin-based capital computation included the NFA's capital requirements for its members is currently set forth in ¶ 7001 of the NFA Manual, Section 1(a)(vi) (2004).

[31] SEC Rule 17a–11(c) requires notice by no later than 24 hours after the broker-dealer's net capital falls below the SEC's required early warning level.

[32] 63 FR 45711, 45713 (August 27, 1988) (adopting rules that would also apply "know or should have known" standard for undersegregation notices pursuant to Rule 1.12(h)).

stating what steps have been and are being taken to correct the situation. Paragraph (d) of Rule 1.12 requires an FCM or IB that discovers, or is notified by an independent public accountant pursuant to Rule 1.16(e)(2), of the existence of any material inadequacy as specified in Rule 1.16(d)(2), to provide notice within three business days, and within five business days after giving such notice to file a written report stating what steps have been and are being taken to correct the material inadequacy.

For paragraphs (c) and (d) of Rule 1.12, the Proposing Release proposed to reduce the notice and reporting time frames specified within these paragraphs to be the same as the time frames provided in corresponding SEC regulations governing registered securities broker-dealers. Specifically, the proposed revisions would require an FCM or IB: (i) To transmit within 48 hours the required report stating what the FCM or IB has done or is doing to correct the situation that has caused the firm to fail to maintain current books and records; and (ii) to notify the Commission within 24 hours of discovering a material inadequacy in its accounting systems, and to transmit the required report within 48 hours of such discovery.[33] None of the commenters objected to the proposed shorter periods in Rules 1.12(c) and (d) for FCMs and IBs to file the required notices and reports related to their books and records and internal controls. The Commission is adopting as final the amendments to paragraphs (c) and (d) as proposed in the Proposing Release.[34]

IV. Satisfactory Subordination Agreements and Equity Capital

Commission Rule 1.17(c)(4)(i) permits an FCM or IB, in computing its adjusted net capital, to exclude liabilities that are subordinated to the claims of the firm's general creditors if such subordinated liabilities arise under "satisfactory subordination agreements" as defined in Rule 1.17(h). The criteria set forth in Rule 1.17(h) for such "satisfactory" subordination agreements include several limitations upon the FCM's or IB's ability to repay or prepay the subordinated obligation. By way of such limitations, the Commission seeks to enhance the stability and permanence of the firm's capital, and to prevent the firm's subordinated debt lenders from withdrawing firm capital to the detriment of the general creditors.

One of the payment limitations specified in Rule 1.17(h) prohibits any prepayment of the subordinated loan after the first year of the agreement unless the firm maintains adjusted net capital in excess of the minimum amount that would otherwise be required under Rule 1.17(a).[35] Specifically, Rule 1.17(h)(2)(vii)(A) restricts subordinated debt prepayments if such prepayments would cause the FCM's or IB's adjusted net capital to be less than the greater of:

a. 120 percent of the minimum dollar amount specified for FCMs in 1.17(a)(1)(i)(A) or for IBs in 1.17(a)(1)(iii)(A) (for FCMs, the required amount would be $300,000, or 120 percent of $250,000; for IB's the required amount would be $36,000);[36]

b. For FCMs, 7 percent of the Segregated Amount;

c. 120 percent of the amount of adjusted net capital required by a registered futures association of which the FCM is a member; or

d. For FCMs that also are registered with the SEC as securities brokers or dealers, the amount of net capital required by SEC Rule 15c3–1d(b)(7).

Several other provisions of Rule 1.17(h) also specify percentages of minimum adjusted net capital to restrict repayments or require action by firms in connection with their satisfactory subordination agreements. These provisions specify percentages applicable to each of the alternative adjusted net capital computations set forth in Rule 1.17(a), including capital computations based upon the Segregated Amount. For example, Rule 1.17(h)(3)(ii) and (h)(2)(viii)(A) require FCMs to suspend any repayment of their subordination agreements, and to provide notice of maturity/accelerated maturity to the Commission, if the FCM's payment obligations, then due or maturing within a specified period, would result in adjusted net capital of less than 6 percent of the Segregated Amount. Furthermore, an FCM whose adjusted net capital would be less than 7 percent of the Segregated Amount is subject to restrictions under Rule 1.17(h)(2)(vi)(C) on any reductions of the unpaid principal balance under a secured demand note subordination agreement,[37] and also subject to restrictions under Rule 1.17(h)(3)(v) on the use of temporary subordinations.[38] Finally, Rule 1.17(h)(2)(vii)(B) restricts "special prepayments" by FCMs whose adjusted net capital would be less than 10 percent of the Segregated Amount.[39] In light of the amendments to Rule 1.17(a) adopted by this rulemaking, the capital computations within Rule 1.17(h) that are based on the Segregated Amount must also be amended. Furthermore, similar amendments are also required for Commission Rule 1.17(e), which sets forth the requirements for a firm's "debt-equity total", *i.e.*, the total of the outstanding principal amount of satisfactory subordination agreements plus the firm's "equity capital".[40] One of the provisions of Rule 1.17(e) requires a specified percentage of minimum adjusted net capital based on the

[33] 68 FR at 40842–3.

[34] The JAC proposed that the Commission also consider, in addition to the rule amendments that the Commission had proposed in the Proposing Release to paragraphs (b), (c) and (d) of Rule 1.12, an amendment to delete paragraph (f)(5) from Rule 1.12. Rule 1.12(f)(5) currently obligates an FCM to provide notice immediately whenever its excess adjusted net capital is less than 6 percent of the maintenance margin required by the FCM on all positions in accounts of a noncustomer. The JAC stated that it believed that this regulation would no longer be necessary because the risk-based capital requirement includes an assessment for an FCM's exposure to noncustomer positions. Commission staff is reviewing this proposal for possible future publication as a proposed rule, with request for public comment.

[35] Prior to the end of the first year, Rule 1.17(h)(2)(vii) generally prohibits any prepayment of the subordinated loan irrespective of whether the firm holds sufficient excess capital.

[36] The Commission redesignated paragraph (a)(1)(ii)(A) of Rule 1.17 as paragraph (a)(1)(iii)(A) in 2001. 66 FR 53510 (October 23, 2001). The Commission therefore proposed technical amendments to various subparagraphs of Rule 1.17(h), and also to Rule 1.17(e), to correct all references within those rules to 1.17(a)(1)(ii)(A) to read 1.17(a)(1)(iii)(A). 68 FR at 40843. The Commission has further determined that Rules 1.10(j)(8)(ii)(A) and 1.17(a)(2)(ii) require similar revision, as these rules also include references to paragraph (a)(1)(ii) of Rule 1.17. The Commission is therefore adopting amendments to Rules 1.17(h) and (e) as proposed, and also is adopting similar amendments to Rules 1.10(j)(8) and 1.17(a)(2). As amended, the existing references within these rules to paragraph (a)(1)(ii) of Rule 1.17 will be revised to read (a)(1)(iii).

[37] The subordination agreement may provide for the FCM or IB to receive either (i) cash or (ii) a demand note that is payable to the FCM or IB and secured by cash or securities that satisfy requirements set forth in the rule.

[38] Pursuant to several conditions specified in the rule, an FCM or IB may qualify for approval of a temporary satisfactory subordination agreement that has a stated term of no more than 45 days.

[39] "Special prepayments" is the term used in Rule 1.17 for prepayments made under revolving subordinated agreements. Because revolving agreements may permit prepayments at any time, such payments ordinarily would conflict with Rule 1.17(h)(2)(vii)(prohibiting prepayment within one year of the date upon which the governing subordination agreement became effective.) In 1982, the Commission determined that special prepayments would be acceptable if subject to various conditions, including a higher level of minimum adjusted net capital (10 percent of segregated funds) than is required for prepayments that are subject to the one-year restriction (7 percent of segregated funds). 47 FR 22352 (May 24, 1982).

[40] Rule 1.17(e) requires the firm to hold 30 percent of the total as equity capital. Rule 1.17(d)(1) defines the term "equity capital" to include retained earnings and other specified forms of investment. The term also includes funds received under subordination agreements that are not only satisfactory under Rule 1.17(h), but also meet other, more restrictive criteria specified in Rule 1.17(d).

Segregated Amount as a condition for permitting an FCM or IB to make withdrawals of equity capital. Specifically, any withdrawal of equity capital is prohibited if, among other things, it would result in adjusted net capital of less than 6 percent of the Segregated Amount.

In the Proposing Release, the Commission proposed to conform all of the computations in paragraphs (e) and (h) of Rule 1.17 that refer to the Segregated Amount to refer instead to the risk-based capital computation that was proposed in Rule 1.17(a)(1)(i)(B).[41] The Commission stated that the proposed amendments would: (i) Eliminate calculations based on the Segregated Amount; (ii) adopt calculations based on the required maintenance margin for customer and noncustomer futures and option positions carried by an FCM; and (iii) apply percentage requirements that reflect the same proportional increase currently required under Rule 1.17(e) and (h).[42] Thus, for example, where Rule 1.17(e) included a calculation based upon six percent of the Segregated Amount, the Commission proposed to eliminate this calculation and require 150 percent of an FCM's risk-based minimum adjusted net capital requirement. Using this approach for purposes of an FCM's equity capital and satisfactory subordination agreements would result in required percentages of risk-based minimum adjusted net capital of either 150 percent or 175 percent, except that an FCM would be required to hold 250 percent of risk-based minimum adjusted net capital in order to make "special prepayments" under a satisfactory subordination agreement.

Of the ten comment letters received by the Commission, the majority had no comments on these proposed conforming revisions to Rule 1.17(e) and (h). One FCM proposed 125 percent as a specific alternative percentage for the Commission to consider for all of the applicable provisions of Rule 1.17(e) and (h), while the NFA suggested using 120 percent, which is the same percentage that Rules 1.17(e) and (h) currently require in the case of minimum adjusted net capital computations that are based on the capital requirements of a registered futures association. The JAC suggested that the Commission might consider reducing the proposed percentages, but did not make any specific recommendations for the percentages to be included in Rules 1.17(e) and (h).

Upon further consideration, the Commission notes that in all but one of the relevant paragraphs of Rules 1.17(e) and (h), the required percentage of minimum adjusted net capital is 120 percent, regardless of whether the FCM's capital computation is based on a registered futures association's capital requirements or on the FCM's required minimum dollar amount ($250,000). This similarity is the product of the Commission's determination in 1995, when proposing to amend Rules 1.17(e) and (h) to include capital computations that would be based on the capital requirements of a registered futures association, to apply the same percentages as then required for capital computations based upon the minimum dollar amount set forth in Rule 1.17(a)(1)(i)(A).[43] Accordingly, the Commission has determined to take the same approach here and reduce to 120 percent all but one of the percentages proposed in the Proposing Release for Rules 1.17(e) and (h). The exception in the amended rule will be in paragraph (h)(2)(vii)(B), which restricts "special prepayments" made under satisfactory subordination agreements, and requires a computation of 200 percent of an FCM's minimum adjusted net capital that is based on a minimum dollar amount, *i.e.*, 200 percent of $250,000. In light of the comments received on the enhanced responsiveness of margin-based capital requirements to significant major market moves, the Commission believes that it is sufficient for the purposes of the identified paragraph to amend the rule to require 125 percent of minimum adjusted net capital that is based on an FCM's margin-based capital requirements. The Commission is therefore adopting the amendments to Rule 1.17(e) and (h) as set forth in the Proposing Release, with the following modifications: (1) the required percentage of risk-based minimum adjusted net capital will be 120 percent for subparagraphs (e)(1)(ii), (h)(2)(vi)(C)(*2*), (h)(2)(vii)(A)(*2*), (h)(2)(viii)(A)(*2*), (h)(3)(ii)(B), and (h)(3)(v)(B) of Rule 1.17; and, (2) in subparagraph (h)(2)(vii)(B)(*2*), the required percentage will be 125 percent of an FCM's risk-based minimum adjusted net capital requirement as determined under amended Rule 1.17(a)(1)(i)(B).

The Commission also proposed in the Proposing Release to amend Rule 1.17(h)(3)(vii) to "grandfather" in agreements that, prior to the effective date of the final rules as adopted, had been determined to be satisfactory subordination agreements pursuant to Rule 1.17(h).[44] No commenter objected to this proposal, and the Commission adopts the amendment as proposed.

V. Capital Charge for Undermargined Accounts Under Rule 1.17(c)(5)

Commission Rule 1.17(c)(5)(viii) requires an FCM, in computing its adjusted net capital, to take a reduction (*i.e.*, capital charge) from its net capital for any customer account that is undermargined and the margin call issued to the customer has not been answered by the third business day following the issuance of the call. Rule 1.17(c)(5)(ix) requires an FCM to take a capital charge for noncustomer accounts if a noncustomer fails to answer a margin call by the second business day following the issuance of the call. The capital charge under Rule 1.17(c)(5)(viii) and (ix) is equal to the amount of funds required in the undermargined account to meet maintenance margin requirements of the applicable board of trade that the futures or options contracts were executed on or the clearing organization that cleared such transactions. For both customer and noncustomer accounts, the Commission issued proposed rule amendments that would reduce the collection period before a capital charge would have to be taken to one business day following the issuance of a margin call.[45]

Several commenters expressly acknowledged that payment by electronic means within one day after the issuance of a margin call reflects the current practice of the industry in many instances, especially with respect to institutional customers. FIA, NFA, and all five of the individual FCMs, however, expressly objected to shortening the period under Rule 1.17(c)(5)(viii) for outstanding margin calls for customer accounts. The prevailing theme of these comments is that there remain instances in which meeting a margin call within one day may not be possible, and is unrelated to any impaired financial capacity of the customer to ultimately meet the margin call.

FIA also expressed its view that it is not necessary to reduce the period

[41] 68 FR at 40843–4.

[42] The cited paragraphs also contain references to 1.17(a)(1)(ii)(A), which has been redesignated 1.17(a)(1)(iii)(A). The Commission therefore also proposed, and is now adopting, a technical amendment to correct the references in these paragraphs to read as 1.17(a)(1)(iii)(A).

[43] The Commission's approach is described in the **Federal Register** release proposing these amendments in 1995. 60 FR 63995, 63997, fn. 16. (Dec. 13, 1995). The proposed rules were adopted in 1996. 60 FR 19177 (May 1, 1996). These rules were therefore adopted prior to NFA's amendment of its capital rule, in 2000, to include a computation based upon maintenance margin.

[44] 68 FR at 40843.

[45] 68 FR at 40839–40.

currently applicable to customer accounts to achieve the Commission's objectives. FIA pointed out that margin-based capital requirements are sufficient to address the Commission's concerns articulated in the Proposing Release, particularly the fact that the futures industry has recently experienced significant increases in the number of products offered on futures markets, and the higher volatility associated with some of these products. Several of FIA's comments also questioned the Commission's assumption concerning the ease and convenience of meeting margin calls in one day through the electronic transfer of funds. First, FIA observed that an international client might receive a margin call after the closing hours of banks where its accounts are maintained, or during a holiday schedule applicable in the bank's location. FIA further stated that it might take more than the prescribed period to resolve funds that have been mistakenly misdirected. Finally, FIA pointed out that retail clients generally continue to meet margin calls by means of a check rather than a wire transfer.

Two FCMs and the NIBA commented that a number of small to medium business entities, including small commercial hedgers and agricultural interests, also meet margin calls through check payments. In many cases, according to one FCM, the cost of using a wire transfer could be a significant percentage of the margin call. If the FCM does not require that its customers incur such wire transfer fees, the FCM will incur a capital charge for serving this market. Another FCM commented that the costs of requiring payment by wire transfer, for which most bank charge substantial fees, would impose a burden on the market participation of these customers, and the increased cost associated with servicing this market segment could result in higher commissions and lower market access for the retail customer.

For those FCMs with a retail client base, therefore, FIA stated that it is impractical to expect the receipt of margin payment within less than three business days. FIA further noted that a number of U.S. futures contracts are denominated in a foreign currency, and it can take two business days to settle a wire transfer for many of these currencies. One FCM noted that even with only a moderate retail and foreign customer base, it anticipated having to double or triple its daily undermargined capital charge.

Apart from issues related to the use of wire transfers to meet margin calls, FIA and NFA also expressed concerns that the shorter time period contemplated by the Commission might be insufficient for institutional trading managers to meet their margin calls. FIA noted its understanding that the reconciliation process for trades executed on behalf of institutional trading managers can extend into the business day following the trade date, resulting from a number of factors, including late give-ins. Because these entities actively manage their cash assets, excess cash must be invested early in the day in order to enhance available yield, and these trading managers establish early morning cut-off times for the receipt of margin calls. Although trading managers generally receive preliminary margin calls before the early morning cut-off, the size of the call may not be confirmed until after the established cut-off time, thus possibly resulting in delays beyond the one-business-day period being proposed by the Commission.

Upon reviewing the comments received, the Commission has determined not to adopt the proposed amendments to Rules 1.17(c)(5)(viii) and (ix) that were set forth in the Proposing Release. The amendments were not proposed in response to observed specific deficiencies in the FCMs' processes for the collection of margin, and the Commission is persuaded that the existing Commission and exchange rules continue to reinforce the industry's own practices for collecting margin as soon as possible, while taking into consideration circumstances that may result in margin not being paid within one day of the issuance of a margin call which are commercially reasonable and not indicative of any impaired financial capacity of the recipient to ultimately meet the margin call.

VI. Financial Reporting Requirements

The Proposing Release included amendments to Rule 1.10(b) to require each FCM to file an unaudited Form 1–FR–FCM, or FOCUS Report for an FCM also registered with the SEC as a securities broker or dealer, with the Commission and with the FCM's DSRO as of the end of each month, including the FCM's fiscal year end. Such financial reports are required to be filed within 17 business days of the end of each month.[46] The preparation of such monthly financial reports also would satisfy an FCM's requirement to prepare and to maintain a monthly formal computation of its adjusted net capital under Rule 1.18(b).[47] The Commission also proposed to facilitate Form 1–FR filings by FCMs and IBs by expanding the list of persons from whom the Commission would accept the oath or affirmation that is required by Rule 1.10(d)(4).[48] FIA, NFA and the JAC expressed support for the proposals to amend Rules 1.10(b), 1.10(d)(4) and 1.18. The Commission has determined to amend Rules 1.10(b) and 1.18 as proposed, but to revise the text amendments that were suggested for Rule 1.10(d)(4) in the Proposing Release.

A. Oath and Affirmation Requirements

Rule 1.10(d)(4) seeks to ensure that the required oath or affirmation is provided by persons that have authority to bind the FCM or IB, who also have an appropriate level of ongoing financial and/or managerial responsibility for the financial information provided in the reports filed with the Commission, and who should be bound by the personal attestation. Consistent with this purpose, Rule 1.10(d)(4) currently requires the signature of a chief operating officer, chief financial officer, general partner, or sole proprietor, if the FCM or IB is organized as a corporation, partnership or sole proprietorship, respectively.

As noted in the Proposing Release, the existing list of approved individuals in Rule 1.10(d)(4) does not address other organizational structures under which FCMs and IBs may conduct their business, specifically, limited liability companies ("LLCs"). All fifty states and the District of Columbia have passed statutes in recent years allowing formation of LLCs within their jurisdictions.[49] LLCs are unincorporated entities that, in accordance with the relevant LLC statute, may be managed by their members directly or by managers whose duties are defined by the statute and/or by agreement of the members.[50] While some LLCs include the positions of chief executive officer and chief financial officer, others do not. As of February 29, 2004, at least 40 of the 177 registered FCMs were organized as LLCs.

In response to the need to modernize Rule 1.10(d)(4), the Proposing Release suggested revisions to the rule that would be consistent with amendments then pending to Part 4 of the Commission's rules.[51] The proposed amendments focused on the authority of the signer to bind the FCM or IB, but the Commission believes that it is

[46] 68 FR at 40840, 40845.

[47] 68 FR at 40841, 40848.

[48] 68 FR at 40841, 40846.

[49] Susan P. Hamill, *The Origins Behind the Limited Liability Company*, 59 Ohio St. L.J. 1459 (1998).

[50] Larry E. Ribstein and Robert R. Keatinge, *Ribstein and Keatinge on Limited Liability Companies*, §§ 1.3, 1.6, and 8.2 (2003).

[51] 68 FR at 40841.

additionally appropriate to ensure that persons who submit financial information to the Commission hold positions within the firm that require meaningful familiarity with, and responsibility for, the ongoing operations and finances of the firm. The Commission has therefore determined to adopt amendments to Rule 1.10(d)(4) to designate, for each form of business organization, the officers or other individuals from whom the oath or affirmation would be required, as follows: if a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the chief executive officer or chief financial officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.[52] As amended, Rule 1.10(d)(4) uses some of the same terms that were adopted by the Commission when modernizing Commission Regulation 3.1(a) in 2001 to recognize the existence of limited liability companies.[53]

The Proposing Release also proposed to amend Rule 1.10(d)(4) to permit the oath or affirmation, if the registrant or applicant is registered with the SEC as a securities broker or dealer, to be provided by the representative authorized under SEC Rule 17a–5. The Commission adopts this amendment as proposed in the Proposing Release.

B. Filings With NFA and Other Reporting Requirements

The Commission proposed to amend Rule 1.10(c) to provide that an IB would file an unaudited Form 1–FR–IB solely with NFA.[54] The Proposing Release additionally invited comment on whether, and under what conditions, the Commission should amend its rules to permit IBs to file annual certified financial statements solely with NFA. NFA supported having IBs file solely with NFA both unaudited and audited financial reports, and no commenters objected to these proposals. Having considered these proposals, the Commission hereby amends Rule 1.10(c) to provide that IBs will file the unaudited Form 1–FRs required by Rule 1.10(b)(2)(i), and the annual certified financial statements required by Rule 1.10(b)(2)(ii), with NFA only.

The Proposing Release included amendments that would permit an FCM's or IB's DSRO, or, as applicable, its designated examining authority under SEC rules, to approve the FCM's or IB's application for change in fiscal year under Rule 1.10(e), or an application for an extension of time to file an audited or unaudited financial statement under Rules 1.10(f) or 1.16(f), subject to specified conditions.[55] The Commission is adopting as final the proposed amendments to Rules 1.10(e) and (f) and 1.16(f), with some modifications from the versions set forth in the Proposing Release. These modifications have been made to reflect the amendments to Rule 1.10(c) that will require IBs to file their uncertified and certified financial reports solely with NFA.[56]

VII. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission invited the public to comment on the Chairman's certification that these rules would not have a significant economic impact on a substantial number of small entities.[57] The Commission received no comments on the certification.

B. Paperwork Reduction Act

This rulemaking includes information collection requirements. As required by the Paperwork Reduction Act of 1995 ("PRA"),[58] the Commission submitted a copy of the proposed rule amendments to the Office of Management and Budget ("OMB") for its review. No comments were received in response to the Commission's invitation in the proposed rules to comment on any potential paperwork burden associated with regulation.[59]

C. Cost-Benefit Analysis

Section 15(a) of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, section 15(a) as amended does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the regulation outweigh its costs. Rather, section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) of the Act further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The amended rules adopted by the Commission pertain to the minimum financial and related reporting requirements for FCMs and IBs.[60] The Commission is considering the costs and benefits of these various proposed rules in light of the specific provisions of section 15(a) of the Act, as follows:

1. *Protection of market participants and the public.* The amended rules for reporting requirements provide the benefit of aiding the Commission and DSROs to monitor the financial condition of futures intermediaries and to protect the customers of those firms and the markets. The Commission anticipates that the costs of compliance with the amended reporting requirements will be minimized by amended rules that will streamline filing requirements. In addition, the amended rules will "grandfather" in existing satisfactory subordination

[52] A limited liability partnership is a general partnership which, as a result of a filing with the secretary of state (and, in some cases, the maintenance of a certain level of insurance and the payment of an annual fee to the state) limits the vicarious liability of the partners. *See* Larry E. Ribstein and Robert R. Keatinge, *Ribstein and Keatinge on Limited Liability Companies*, § 16.28 (2003).

[53] Commission Regulation 3.1(a) specifies those "principals" that are required under the Act to register with the Commission. Rule 3.1(a)(1) includes as principals "any director, the president, chief executive officer, chief operating officer, chief financial officer, the manager, managing member or those members vested with the management authority" for a limited liability company or limited liability partnership.

[54] 68 FR at 40842, 40845.

[55] 68 FR at 40841–2, 40846–40847.

[56] Most significantly, the modified versions eliminate the requirement that IBs file with the Commission copies of their applications for changes in fiscal year or extended filing deadlines, or the notices approving or denying such applications.

[57] 68 FR at 40844.

[58] 44 U.S.C. 3507(d).

[59] 68 FR at 40844.

[60] Section 4f(b) of the Act prohibits persons from becoming registered as FCMs or IBs if they do not meet the minimum financial requirements set forth in either the Commission's regulations or in such Commission-approved requirements as may be established by the contract markets and derivatives transaction execution facilities of which the FCM or IB is a member.

agreements, meaning that FCMs or IBs would incur no costs to comply with proposed amendments to Rule 1.17, unless such agreements would be amended or renewed for other reasons.

2. *Efficiency and competition.* As stated above, the Commission anticipates that the amended rules will benefit efficiency by eliminating duplicate filings and otherwise streamlining reporting requirements for FCMs and IBs. The amended rules should have no effect, from the standpoint of imposing costs or creating benefits, on competition in the futures and options markets.

3. *Financial integrity of futures markets and price discovery.* The amended rules contribute to the benefit of ensuring that FCMs and IBs can meet their financial obligations to customers and other market participants, thus contributing to the financial integrity of the futures and options markets as a whole. The amended rules should have no effect, from the standpoint of imposing costs or creating benefits, on the price discovery function of such markets.

4. *Sound risk management practices.* The amended rules for capital requirements seek to reflect appropriately the level of risk that different activities and obligations of FCMs and IBs may pose to their financial condition. The amended rules may therefore contribute to the sound risk management practices of futures intermediaries.

5. *Other public interest considerations.* The Commission believes that the amended rules are beneficial in that they harmonize Commission and SEC rules with respect to time frames for reporting conditions that may be potentially adverse to the financial condition of the FCM or IB.

The Commission invited, but did not receive, public comment on its application of the cost-benefit provision. After considering these factors, the Commission has determined to issue this final rule.

List of Subjects in 17 CFR Part 1

Brokers, Commodity futures, Reporting and recordkeeping requirements.

■ For the reasons presented above, the Commission hereby amends 17 CFR part 1 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by the Commodity Futures Modernization Act of 2000, appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

■ 2. Section 1.10 is amended by revising paragraphs (b)(1), (b)(2)(i), (c), (d)(4), (e), and (f) to read as follows:

§ 1.10 Financial reports of futures commission merchants and introducing brokers.

* * * * *

(b) *Filing of financial reports.* (1)(i) Except as provided in paragraphs (b)(3) and (h) of this section, each person registered as a futures commission merchant must file a Form 1–FR–FCM as of the close of business each month. Each Form 1–FR–FCM must be filed no later than 17 business days after the date for which the report is made.

(ii) In addition to the monthly financial reports required by paragraph (b)(1)(i) of this section, each person registered as a futures commission merchant must file a Form 1–FR–FCM as of the close of its fiscal year, which must be certified by an independent public accountant in accordance with § 1.16, and must be filed no later than 90 days after the close of the futures commission merchant's fiscal year: *Provided, however,* that a registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer must file this report not later than the time permitted for filing an annual audit report under § 240.17a–5(d)(5) of this title.

(2)(i) Except as provided in paragraphs (b)(3) and (h) of this section, and except for an introducing broker operating pursuant to a guarantee agreement which is not also a securities broker or dealer, each person registered as an introducing broker must file a Form 1–FR–IB semiannually as of the middle and the close of each fiscal year unless the introducing broker elects, pursuant to paragraph (e)(1) of this section, to file a Form 1–FR–IB semiannually as of the middle and the close of each calendar year. Each Form 1–FR–IB must be filed no later than 17 business days after the date for which the report is made.

* * * * *

(c) *Where to file reports.* (1) A report filed by an introducing broker pursuant to paragraph (b)(2)(i) or (b)(2)(ii) of this section need be filed only with, and will be considered filed when received by, the National Futures Association. Other reports provided for in this section will be considered filed when received by the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located and by the designated self-regulatory organization, if any; and reports required to be filed by this section by an applicant for registration will be considered filed when received by the National Futures Association and by the regional office of the Commission with jurisdiction over the state in which the applicant's principal place of business is located.

(2) Any report filed pursuant to paragraph (b)(1) or (b)(4) of this section or § 1.12(a) which need not be certified in accordance with § 1.16 may be submitted to the Commission in electronic form using a Commission-assigned Personal Identification Number, and otherwise in accordance with instructions issued by the Commission, if the futures commission merchant, introducing broker or a designated self-regulatory organization has provided the Commission with the means necessary to read and to process the information contained in such report.

(3) Any information required of a registrant by a self-regulatory organization pursuant to paragraph (b)(4) of this section need be furnished only to such self-regulatory organization and the Commission, and any information required of a registrant by the National Futures Association pursuant to paragraph (b)(4) of this section need be furnished only to the National Futures Association and the Commission.

(4) Any guarantee agreement entered into between a futures commission merchant and an introducing broker in accordance with the provisions of this section need be filed only with, and will be considered filed when received by, the National Futures Association.

(d) * * *

(4) Attached to each Form 1–FR filed pursuant to this section must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the Form 1–FR is true and correct. The individual making such oath or affirmation must be:

(i) If the registrant or applicant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the chief executive officer or chief financial officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership; or

(ii) If the registrant or applicant is registered with the Securities and Exchange Commission as a securities broker or dealer, the representative authorized under § 240.17a–5 of this title to file for the securities broker or dealer its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, part II or part IIA. In the case of a Form 1–FR filed via electronic transmission in accordance with procedures established by the Commission, such transmission must be accompanied by the Commission-assigned Personal Identification Number of the authorized signer and such Personal Identification Number will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in this paragraph.

(e) *Election of fiscal year.* (1) An applicant wishing to establish a fiscal year other than the calendar year may do so by notifying the National Futures Association of its election of such fiscal year, in writing, concurrently with the filing of the Form 1–FR pursuant to paragraph (a)(2) of this section, but in no event may such fiscal year end more than one year from the date of the Form 1–FR filed pursuant to paragraph (a)(2) of this section. An applicant that does not so notify the National Futures Association will be deemed to have elected the calendar year as its fiscal year.

(2) (i) A registrant must continue to use its elected fiscal year, calendar or otherwise, unless a change in such fiscal year has been approved pursuant to this paragraph (e)(2).

(ii) *Futures commission merchant registrants.* (A) A futures commission merchant may file with its designated self-regulatory organization an application to change its fiscal year, a copy of which the registrant must file with the Commission. The application shall be approved or denied in writing by the designated self-regulatory organization. The registrant must file immediately with the Commission a copy of any notice it receives from the designated self-regulatory organization to approve or deny the registrant's application to change its fiscal year. A written notice of approval shall become effective upon the filing by the registrant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization copies of any notice or application filed with its designated examining authority, pursuant to § 240.17a–5(d)(1)(i) of this title, for a change in fiscal year or "as of" date for its annual audited financial statement. The registrant must also file immediately with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the registrant's request for change in fiscal year or "as of" date. Upon the receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the change in fiscal year or "as of" date referenced in the notice shall be deemed approved under this paragraph (e)(2).

(C) Any copy that under this paragraph (e)(2) is required to be filed with the Commission shall be filed with the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located, and any copy or application to be filed with the designated self-regulatory organization shall be filed at its principal place of business.

(iii) *Introducing broker registrants.* (A) An introducing broker may file with the National Futures Association an application to change its fiscal year, which shall be approved or denied in writing.

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with the National Futures Association copies of any notice or application filed with its designated examining authority, pursuant to § 240.17a–5(d)(1)(i) of this title, for a change in fiscal year or "as of" date for its annual audited financial statement. The registrant must also file immediately with the National Futures Association copies of any notice it receives from its designated examining authority to approve or deny the registrant's request for change in fiscal year or "as of" date. Upon the receipt by the National Futures Association of copies of any such notice of approval, the change in fiscal year or "as of" date referenced in the notice shall be deemed approved under this paragraph (e)(2).

(f) *Extension of time for filing uncertified reports.* (1) In the event a registrant finds that it cannot file its Form 1–FR, or, in accordance with paragraph (h) of this section, its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, part II or part IIA (FOCUS report), for any period within the time specified in paragraphs (b)(1)(i) or (b)(2)(i) of this section without substantial undue hardship, it may request approval for an extension of time, as follows:

(i) *Futures commission merchant registrants.* (A) A futures commission merchant may file with its designated self-regulatory organization an application for extension of time, a copy of which the registrant must file with the Commission. The application shall be approved or denied in writing by the designated self-regulatory organization. The registrant must file immediately with the Commission a copy of any notice it receives from the designated self-regulatory organization to approve or deny the registrant's request for extension of time. A written notice of approval shall become effective upon the filing by the registrant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17–a5(l)(5) of this title, for an extension of time to file its FOCUS report. The registrant must also file immediately with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1).

(C) Any copy that under this subparagraph (f)(1)(i) is required to be filed with the Commission shall be filed with the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located.

(ii) *Introducing broker registrants.* (A) An introducing broker may file with the National Futures Association an application for extension of the time, which shall be approved or denied in writing.

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with the National Futures Association copies of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17–a5(l)(5) of this title, for an extension of time to file its FOCUS report. The registrant

must also file immediately with the National Futures Association copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon the receipt by the National Futures Association of a copy of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this subparagraph (f)(1(ii).

(2) In the event an applicant finds that it cannot file its report for any period within the time specified in paragraph (b)(4) of this section without substantial undue hardship, it may file with the National Futures Association an application for an extension of time to a specified date which may not be more than 90 days after the date as of which the financial statements were to have been filed. The application must state the reasons for the requested extension and must contain an agreement to file the report on or before the specified date. The application must be received by the National Futures Association before the time specified in paragraph (b)(4) of this section for filing the report. Notice of such application must be filed with the regional office of the Commission with jurisdiction over the state in which the applicant's principal place of business is located concurrently with the filing of such application with the National Futures Association. Within ten calendar days after receipt of the application for an extension of time, the National Futures Association shall:

(i) Notify the applicant of the grant or denial of the requested extension; or

(ii) Indicate to the applicant that additional time is required to analyze the request, in which case the amount of time needed will be specified.

* * * * *

■ 3. Section 1.12 is amended by revising paragraphs (a)(1), (b)(1), (b)(2), (b)(3), (b)(4), (c), (d), (e), (f), (h) and (i)(1) to read as follows:

§ 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

(a) * * *

(1) Give telephonic notice, to be confirmed in writing by facsimile notice, as set forth in paragraph (i) of this section that the applicant's or registrant's adjusted net capital is less than required by § 1.17 or by other capital rule, identifying the applicable capital rule. The notice must be given immediately after the applicant or registrant knows or should know that its adjusted net capital is less than required by any of the aforesaid rules to which the applicant or registrant is subject; and

* * * * *

(b) * * *

(1) 150 percent of the minimum dollar amount required by § 1.17(a)(1)(i)(A);

(2) 110 percent of the amount required by § 1.17(a)(1)(i)(B);

(3) 150 percent of the amount of adjusted net capital required by a registered futures association of which it is a member, unless such amount has been determined by a margin-based capital computation set forth in the rules of the registered futures association, and such amount meets or exceeds the amount of adjusted net capital required under the margin-based capital computation set forth in § 1.17(a)(1)(i)(B), in which case the required percentage is 110 percent, or

(4) For securities brokers or dealers, the amount of net capital specified in Rule 17a–11(c) of the Securities and Exchange Commission (17 CFR 240.17a–11(c)), must file written notice to that effect as set forth in paragraph (i) of this section within twenty-four (24) hours of such event.

(c) If an applicant or registrant at any time fails to make or keep current the books and records required by these regulations, such applicant or registrant must, on the same day such event occurs, provide facsimile notice of such fact, specifying the books and records which have not been made or which are not current, and within forty-eight (48) hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(d) Whenever any applicant or registrant discovers or is notified by an independent public accountant, pursuant to § 1.16(e)(2) of this chapter, of the existence of any material inadequacy, as specified in § 1.16(d)(2) of this chapter, such applicant or registrant must give facsimile notice of such material inadequacy within twenty-four (24) hours, and within forty-eight (48) hours after giving such notice file a written report stating what steps have been and are being taken to correct the material inadequacy.

(e) Whenever any self-regulatory organization learns that a member registrant has failed to file a notice or written report as required by § 1.12, that self-regulatory organization must immediately report this failure by telephone, confirmed in writing immediately by facsimile notice, as provided in paragraph (i) of this section.

(f)(1) Whenever a clearing organization determines that any position it carries for one of its clearing members which is registered as a futures commission merchant or as a leverage transaction merchant must be liquidated immediately, transferred immediately or that the trading of any account of such futures commission merchant or such leverage transaction merchant shall be only for the purposes of liquidation, because that clearing member has failed to meet a call for margin or to make other required deposits, the clearing organization must immediately give telephonic notice, confirmed in writing immediately by facsimile notice, of such a determination to the principal office of the Commission at Washington, DC.

(2) Whenever a registered futures commission merchant determines that any position it carries for another registered futures commission merchant or for a registered leverage transaction merchant must be liquidated immediately, transferred immediately or that the trading of any account of such futures commission merchant or leverage transaction merchant shall be only for purposes of liquidation, because the other futures commission merchant or the leverage transaction merchant has failed to meet a call for margin or to make other required deposits, the carrying futures commission merchant must immediately give telephonic notice, confirmed in writing immediately by facsimile notice, of such a determination to the principal office of the Commission at Washington, DC.

(3) Whenever a registered futures commission merchant determines that an account which it is carrying is undermargined by an amount which exceeds the futures commission merchant's adjusted net capital determined in accordance with § 1.17, the futures commission merchant must immediately give telephonic notice, confirmed in writing immediately by facsimile notice, of such a determination to the designated self-regulatory organization and the principal office of the Commission at Washington, DC. This paragraph (f)(3) shall apply to any account carried by the futures commission merchant, whether a customer, noncustomer, omnibus or proprietary account. For purposes of this paragraph (f)(3), if any person has an interest of 10 percent or more in ownership or equity in, or guarantees, more than one account, or has guaranteed an account in addition to his own account, all such accounts shall be combined. A designated self-regulatory organization may grant an exemption from the provisions of this paragraph to a futures commission merchant with respect to any particular account on a continuous basis provided

the designated self-regulatory organization documents the reasons for granting such an exemption and continues to monitor any such account.

(4) A futures commission merchant shall report immediately by telephone, confirmed immediately in writing by facsimile notice, whenever any commodity interest account it carries is subject to a margin call, or call for other deposits required by the futures commission merchant, that exceeds the futures commission merchant's excess adjusted net capital, determined in accordance with § 1.17, and such call has not been answered by the close of business on the day following the issuance of the call. This applies to all accounts carried by the futures commission merchant, whether customer, noncustomer, or omnibus, that are subject to margining, including commodity futures and options. In addition to actual margin deposits by an account owner, a futures commission merchant may also take account of favorable market moves in determining whether the margin call is required to be reported under this paragraph.

(5)(i) A futures commission merchant shall report immediately by telephone, confirmed immediately in writing by facsimile notice, whenever its excess adjusted net capital is less than six percent of the maintenance margin required by the futures commission merchant on all positions held in accounts of a noncustomer other than a noncustomer who is subject to the minimum financial requirements of:

(A) A futures commission merchant, or

(B) The Securities and Exchange Commission for a securities broker and dealer.

(ii) For purposes of paragraph (f)(5)(i) of this section, maintenance margin shall include all deposits which the futures commission merchant requires the noncustomer to maintain in order to carry its positions at the futures commission merchant.

* * * * *

(h) Whenever a person registered as a futures commission merchant knows or should know that the total amount of its funds on deposit in segregated accounts on behalf of customers, or that the total amount set aside on behalf of customers trading on non-United States markets, is less than the total amount of such funds required by the Act and the Commission's rules to be on deposit in segregated or secured amount accounts on behalf of such customers, the registrant must report such deficiency immediately by telephone notice, confirmed immediately in writing by facsimile notice, to the registrant's designated self-regulatory organization and the principal office of the Commission in Washington, DC, to the attention of the Director and the Chief Accountant of the Division of Clearing and Intermediary Oversight.

(i)(1) Every notice and written report required to be given or filed by this section (except for notices required by paragraph (f) of this section) by a futures commission merchant, an applicant for registration as a futures commission merchant or a self-regulatory organization must be filed with the regional office of the Commission with jurisdiction over the state in which the applicant's or registrant's principal place of business is located, with the designated self-regulatory organization, if any, with the Securities and Exchange Commission, if such applicant or registrant is a securities broker or dealer, and with the National Futures Association, if the firm is an applicant. In addition, every notice required to be given by this section must also be filed with the principal office of the Commission in Washington, DC. Each statement of financial condition, each statement of the computation of the minimum capital requirements pursuant to § 1.17 of this part, and each schedule of segregation requirements and funds on deposit in segregation required by this section must be filed in accordance with the provisions of § 1.10(d) of this part unless otherwise indicated.

* * * * *

■ 4. Section 1.16 is amended by revising paragraph (f) to read as follows:

§ 11.16 Qualifications and reports of accountants.

* * * * *

(f)(1) *Extension of time for filing audited reports.* In the event a registered futures commission merchant or a registered introducing broker finds that it cannot file, without substantial undue hardship, its certified financial statements and schedules for any year within the time specified in § 1.10 (b)(1)(ii) or § 1.10 (b)(2)(ii) of this part, as applicable, such registrants may request approval for an extension of time, as follows:

(i) *Futures commission merchant registrants.* (A) A futures commission merchant may file with its designated self-regulatory organization an application for an extension of time, a copy of which the registrant must file with the Commission. The application shall be approved or denied in writing by the designated self-regulatory organization. The registrant must file immediately with the Commission a copy of any notice it receives from the designated self-regulatory organization to approve or deny the registrant's request for extension of time. A written notice of approval shall become effective upon the filing by the registrant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17–a5(*l*)(1)of this title, for an extension of time to file audited annual financial statements. The registrant must also file immediately with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(i).

(C) Any copy that under this paragraph (f)(1)(i) is required to be filed with the Commission shall be filed with the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located.

(ii) *Introducing broker registrants.* (A) An introducing broker may file with the National Futures Association an application for extension of time, which shall be approved or denied in writing.

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with the National Futures Association copies of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17–a5(*l*)(1) of this title, for an extension of time to file audited annual financial statements. The registrant must also file immediately with the National Futures Association copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon the receipt by the National Futures Association of a copy of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(ii).

(2) *Exemption requests.* On the written request of any designated self-regulatory organization or registrant, or

on its own motion, the Commission may grant an extension of time or an exemption from any of the certified financial reporting requirements of this chapter either unconditionally or on specified terms and conditions.

* * * * *

■ 5. Section 1.17 is amended by:
■ a. revising paragraphs (a)(1)(i)(B) and (b)(4),
■ b. adding new paragraphs (b)(7) and (b)(8), and
■ c. revising paragraphs (e)(1)(i), (e)(1)(ii), (h)(2)(vi)(C)(*1*) and (*2*), (h)(2)(vii)(A)(*1*) and (*2*), (h)(2)(vii)(B)(*1*) and (*2*), (h)(2)(viii)(A)(*1*) and (*2*), (h)(3)(ii)(A) and (B), (h)(3)(v)(A) and (B) and (h)(3)(vii), to read as follows:

§ 1.17 Minimum financial requirements for futures commission merchants and introducing brokers.

(a)(1)(i) * * *

(B) The futures commission merchant's risk-based capital requirement computed as follows:

(*1*) Eight percent of the total risk margin requirement (as defined in § 1.17(b)(8)) for positions carried by the futures commission merchant in customer accounts (as defined in § 1.17(b)(7)), plus

(*2*) Four percent of the total risk margin requirement (as defined in § 1.17(b)(8)) for positions carried by the futures commission merchant in noncustomer accounts (as defined in § 1.17(b)(4)).

* * * * *

(b) * * *

(4) "Noncustomer account" means a commodity futures or option account carried on the books of the applicant or registrant which is either:

(i) An account that is not included in the definition of customer (as defined in § 1.17(b)(2)) or proprietary account (as defined in § 1.17(b)(3)), or

(ii) An account for a foreign-domiciled person trading futures or options on a foreign board of trade, and such account is a proprietary account as defined in § 1.3(y) of this title, but is not a proprietary account as defined in § 1.17(b)(3).

* * * * *

(7) "Customer account" means a commodity futures or option account carried on the books of the applicant or registrant which is either:

(i) An account that is included in the definition of customer (as defined in § 1.17(b)(2)), or

(ii) An account for a foreign-domiciled person trading on a foreign board of trade, where such account for the foreign-domiciled person is not a proprietary account (as defined in § 1.17(b)(3)) or a noncustomer account (as defined in § 1.17(b)(4)(ii)).

(8) "Risk margin" for an account means the level of maintenance margin or performance bond that the futures commission merchant is required to collect under the rules of an exchange, or the rules of a clearing organization if the level of margin to be collected is not determined by the rules of an exchange, from the owner of a customer account or noncustomer account, subject to the following:

(i) Risk margin does not include the equity component of short or long option positions maintained in an account;

(ii) The maintenance margin or performance bond requirement associated with a long option position may be excluded from risk margin to the extent that the value of such long option position does not reduce the total risk maintenance or performance bond requirement of the account that holds the long option position;

(iii) The risk margin for an account carried by a futures commission merchant which is not a member of the exchange or the clearing organization that requires collection of such margin should be calculated as if the futures commission merchant were such a member; and

(iv) If a futures commission merchant does not possess sufficient information to determine what portion of an account's total margin requirement represents risk margin, all of the margin required by the exchange or the clearing organization that requires collection of such margin for that account, shall be treated as risk margin.

* * * * *

(e)(1) * * *

(i) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(ii) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

* * * * *

(h) * * *

(2) * * *

(vi) * * *

(C) * * *

(*1*) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(*2*) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

* * * * *

(vii) * * *

(A) * * *

(*1*) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(*2*) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

* * * * *

(B) * * *

(*1*) 200 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(*2*) For a futures commission merchant or applicant therefor, 125 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

* * * * *

(viii) * * *

(A) * * *

(*1*) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(*2*) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

* * * * *

(h) * * *

(3) * * *

(ii) * * *

(A) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(B) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

* * * * *

(v) * * *

(A) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(B) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

* * * * *

(vii) *Subordination agreements that incorporate adjusted net capital requirements in effect prior to September 30, 2004.* Any subordination agreement that incorporates the adjusted net capital requirements in paragraphs (h)(2)(vi)(C)(*2*), (h)(2)(vii)(A)(*2*) and (B)(*2*), (h)(2)(viii)(A)(*2*), (h)(3)(ii)(B), and (h)(3)(v)(B) of this section, as in effect prior to September 30, 2004, and which has been deemed to be satisfactorily subordinated pursuant to this section prior to September 30, 2004, shall continue to be deemed a satisfactory subordination agreement until the

maturity of such agreement. In the event, however, that such agreement is amended or renewed for any reason, then such agreement shall not be deemed a satisfactory subordination agreement unless the amended or renewed agreement meets the requirements of this section.

* * * * *

■ 6. Section 1.18 is amended by revising paragraph (b) to read as follows:

§ 1.18 Records for and relating to financial reporting and monthly computation by futures commission merchants and introducing brokers.

* * * * *

(b)(1) Each applicant or registrant must make and keep as a record in accordance with § 1.31 formal computations of its adjusted net capital and of its minimum financial requirements pursuant to § 1.17 or the requirements of the designated self-regulatory organization to which it is subject as of the close of business each month. Such computations must be completed and made available for inspection by any representative of the National Futures Association, in the case of an applicant, or of the Commission or designated self-regulatory organization, if any, in the case of a registrant, within 17 business days after the date for which the computations are made, commencing the first month end after the date the application for registration is filed.

(2) An applicant or registrant that has filed a monthly Form 1–FR or Statement of Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II or Part IIA (FOCUS report) in accordance with the requirements of § 1.10(b) will be deemed to have satisfied the requirements of paragraph (b)(1) of this section for such month.

* * * * *

Issued in Washington, DC, on August 5, 2004, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–18349 Filed 8–11–04; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 30

RIN 3038–AB45

Foreign Futures and Foreign Options Transactions

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is amending part 30 of the Commission's regulations to clarify the circumstances under which a foreign futures and options broker (FFOB) that is a member of a foreign board of trade must register or obtain an exemption from registration. The Commission has amended Rule 30.4(a) to clarify that FFOBs are not required to register as futures commission merchants (FCMs) pursuant to Rule 30.4, or to seek exemption from registration under Rule 30.10, if they only carry the following types of U.S.-related accounts that trade on or are subject to the rules of non-U.S. exchanges: Customer omnibus accounts for U.S. FCMs; U.S. affiliate accounts that are proprietary to the FFOB; and/or U.S. accounts that are proprietary to a U.S. FCM. In addition, an FFOB that has U.S. bank branches will be eligible for a Rule 30.10 comparability exemption or exemption from registration under Rule 30.4 based upon compliance with conditions specified in Rule 30.10(b)(1)–(6) and thereby will be able to carry any U.S.-related account for trades on non-U.S. exchanges. The Commission has also deleted Rule 30.4(e), which required an FCM registered under part 30 to maintain a U.S. office.

EFFECTIVE DATE: September 13, 2004.

FOR FURTHER INFORMATION CONTACT: Lawrence B. Patent, Deputy Director, or Susan A. Elliott, Special Counsel, Compliance and Registration Section, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission. Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5439 or (202) 418–5464, or electronic mail: *lpatent@cftc.gov* or *selliott@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Commission has adopted final rules that were first published for comment on August 26, 1999,[1] and republished on April 6, 2004.[2] The Commission proposed amending part 30 of its rules to clarify when foreign futures and options brokers that are members of a foreign board of trade or affiliates of U.S. FCMs must register under the Act or obtain an exemption from registration under the Act.

The Commission's part 30 rules govern, generally, the solicitation and sale of foreign futures[3] and foreign option[4] contracts to customers[5] located in the U.S. Rule 30.4(a) requires any person who solicits or accepts orders and money for foreign futures or foreign option contracts from foreign futures or foreign options customers[6] to register as an FCM under the Act. Rule 30.10 permits any person to seek exemption from any provision of part 30.

Under Rule 30.10 and Appendix A thereto, the CFTC may exempt an FFOB from compliance with certain rules, including those rules pertaining to registration, provided that a comparable regulatory system exists in the firm's home country and that certain safeguards are in place to protect U.S. investors. This exemption process requires that the CFTC issue an Order pursuant to Rule 30.10 granting general relief to the foreign regulator or self-regulatory organization and that individual firms be granted confirmation of relief upon proper application. Generally, a firm that confirms relief under Rule 30.10 must be located outside the U.S. and this relief permits a firm to solicit or accept orders from U.S.-located customers for trading on or subject to the rules of exchanges located outside of the U.S.

II. Final Rules

A. Registration Exemptions

As explained in the rule proposal, the Commission believes that it can provide clarity to its registration requirements under part 30 by specifically addressing, in Rule 30.4, when registration by an FFOB is *not* required. Thus, the Commission has amended Rule 30.4(a)

[1] 64 FR 46613 (August 26, 1999).

[2] 69 FR 17998 (April 6, 2004). The reproposal was substantially the same, except that the 1999 proposal required an entity with a U.S. bank branch applying for a Rule 30.10 exemption to file a specified set of representations with the National Futures Association (NFA), while the 2004 reproposal listed the representations as conditions for compliance with the exemption, in order to reduce the paperwork necessitated by the rule amendments.

[3] "Foreign futures" as defined in part 30 means "any contract for the purchase or sale of any commodity for future delivery made, or to be made, on or subject to the rules of any foreign board of trade." Commission Rule 30.1(a).

[4] "Foreign option" as defined in part 30 means "any transaction or agreement which is or is held out to be of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", made or to be made on or subject to the rules of any foreign board of trade." Commission Rule 30.1(b).

[5] Pursuant to Commission Rule 30.1(c), "Foreign futures or foreign options customer" means "any person located in the United States, its territories or possessions who trades in foreign futures or foreign options: *Provided,* That an owner or holder of a proprietary account as defined in paragraph (y) of [Commission Rule 1.3] shall not be deemed to be a foreign futures or foreign options customer within the meaning of §§ 30.6 and 30.7 of this part."

[6] *See* n. 5, *supra.*

to clarify that FFOBs are not required to register as FCMs if they only carry the following types of U.S.-related accounts that trade on or subject to the rules of non-U.S. exchanges: (1) Foreign futures and options customer omnibus accounts [7] of U.S. FCMs; (2) its own proprietary accounts (including accounts of its U.S. affiliates and others whose accounts are "proprietary" to the FFOB under CFTC Rule 1.3(y)); and/or (3) proprietary accounts of a U.S. FCM. These FFOBs, however, otherwise remain subject to provisions of part 30 that are not dependent upon registration as an FCM, such as the antifraud provision of Rule 30.9. The exemption from registration is self-executing and does not require entities seeking to avail themselves of the exemption to file a petition under Rule 30.10.

An FFOB is eligible for Rule 30.10 relief notwithstanding the presence in the U.S. of a separately-incorporated *affiliate or subsidiary* that engages in a related activity if the following procedural requirements are met: (1) The applicant must identify the name and location of any affiliate or subsidiary in the U.S. which acts in a related capacity (*e.g.*, bank, broker-dealer or dealer in a cash commodity); (2) the applicant must represent that it will not accept any futures-related business from any of its affiliates or subsidiaries in the U.S. other than a proprietary account of the affiliate or subsidiary, unless such entities are registered with the CFTC in the appropriate capacity; and (3) the applicant must represent that it has informed its affiliates or subsidiaries in writing that they may not introduce to, or solicit futures business on behalf of, the applicant, unless such entities are registered with the CFTC in the appropriate capacity.

As explained in the rule proposal, in certain cases CFTC staff has permitted an FFOB with U.S. *bank branches* to obtain a Rule 30.10 exemption under certain conditions on the grounds that a bank branch is viewed as a separate legal entity in many respects under the U.S. federal bank regulatory scheme. This rule codifies those staff positions as set forth in interpretative statements and no-action letters.[8] The Commission is amending Rule 30.10 to clarify that an FFOB with U.S. bank branches may be eligible for confirmation of Rule 30.10 relief if it complies with the following conditions:

(1) No U.S. bank branch, office or division will engage in the trading of futures or options on futures within or from the U.S., except for its own account; [9]

(2) No U.S. bank branch, office or division will refer any foreign futures or foreign options customer to the FFOB or otherwise be involved in the FFOB's business in foreign futures and foreign option transactions;

(3) No U.S. bank branch, office or division will solicit any foreign futures or foreign options business or purchase or sell foreign futures or foreign option contracts on behalf of any foreign futures or foreign option customers or otherwise engage in any activity subject to regulation under Part 30 or engage in any clerical duties related thereto. If any U.S. division, office or branch desires to engage in such activities, it will only do so through an appropriate CFTC registrant;

(4) The FFOB will maintain outside the U.S. all contract documents, books and records regarding foreign futures and option transactions;

(5) The FFOB and each of its U.S. bank branches, offices or divisions agree to provide upon request of the Commission, the NFA or the U.S. Department of Justice, access to their books and records for the purpose of ensuring compliance with the undertakings and consent to make such records available for inspection at a location in the U.S. within 72 hours after service of the request; [10] and

(6) Although it will continue to engage in normal commercial activities, no U.S. bank branch, office or division will establish relationships in the U.S. with the broker's foreign futures and foreign options customers for the purpose of facilitating or effecting transactions in foreign futures and foreign option contracts in the U.S.

Pursuant to these rule amendments, an FFOB that is not required to register under Rule 30.4(a) because it solely carries a U.S. customer omnibus account, an account that would be classified as proprietary to the broker under Commission Rule 1.3(y), or a U.S. FCM's proprietary account, is also not required to register solely because it has U.S. bank branches, so long as it complies with the conditions specified in Rule 30.10(b)(1)–(6), as listed above.[11]

The main difference in the two types of exemptions referred to herein relate to whether the firm seeking exemption is otherwise regulated and what type of accounts it may handle. The exemptions in Rule 30.4 apply to any foreign firm, irrespective of whether it is a member of an exchange or other self-regulatory organization, or a regulatee of a foreign regulatory authority, that has received a Commission order under Rule 30.10. However, such an entity may only handle those U.S.-related accounts described above, customer omnibus or proprietary to itself or to a U.S. FCM. By contrast, the firm seeking confirmation of relief under Rule 30.10 must be otherwise regulated by an entity that has received a Commission order under Rule 30.10, which relief permits the firm to handle any U.S.-related accounts. In either case, if the firm in question has bank branches, the conditions set forth in Rule 30.10(b)(1)–(6) must be met.

The Commission's adoption of these rule amendments supercedes prior staff positions on these subjects.[12] Because

[7] "Foreign futures and options customer omnibus account" is defined at Rule 30.1(d), 17 CFR 30.1(d) (2003).

[8] *See* n. 12, *infra*.

[9] That is, the "house" account of the entity. This is the "narrow" definition of the term "proprietary," as set forth in Commission Rule 1.17(b)(3).

[10] The Commission has recognized that Japanese and Hong Kong laws require that original books and records of any firm located within either country be maintained within the local jurisdiction. *See CFTC Staff Letter* 95–83 [1994–1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,559 at 43,490 (September 20, 1995) (no-action position permitting the Japanese and Hong Kong affiliates of a U.S. FCM to accept directly foreign futures and options orders from certain sophisticated U.S. customers); 62 FR 47792 (September 11, 1997) (extending the relief under *CFTC Staff Letter* 95–83 to the Japanese and Hong Kong affiliates of all U.S. FCMs). That letter is now superceded by this rule. For the purpose of this rulemaking, the Commission will allow foreign futures and options brokers in Japan and Hong Kong to satisfy the books and records requirement by: (1) Providing within 72 hours authenticated copies of its books and records upon request of a Commission, NFA or U.S. Department of Justice representative; (2) providing within 72 hours access to original books and records in the foreign jurisdiction; (3) waiving objection to the admissibility of the copies as evidence in a Commission, NFA or U.S. Department of Justice action against the foreign futures and options broker; and (4) agreeing in the event of a proceeding to provide a witness to authenticate copies of books and records given to the Commission, NFA, or the U.S. Department of Justice. The Commission is clarifying that the books and records from a Japanese or Hong Kong FFOB are also subject to request by NFA and U.S. Department of Justice representatives, as is the case for an FFOB in any other jurisdiction.

[11] The rationale for providing relief to foreign firms with bank branches in the U.S. is that those branches are otherwise regulated by the banking authorities. Although this rationale would be inapplicable to non-bank branches, there may be other reasons why exemption from registration under part 30 would be appropriately granted upon application by Commission staff.

[12] *See* CFTC Staff Letter 87–7 (customer omnibus accounts), [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,972 (November 17, 1987); CFTC Staff Letter 88–15 (proprietary accounts), [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,296 (August 10, 1988); CFTC Staff Letter 89–5 (bank branches), [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,471 (December 8, 1988); and CFTC Staff Letter 89–11 (bank branches),

Continued

the rule amendments contain no substantive changes to prior staff interpretative statements and no-action letters, no party should be disadvantaged. The new rules will make these staff positions more accessible and more widely understood and obviate the need for individualized relief.

Two comments were submitted in response to the Commission's reproposal. Both were generally supportive of the rule amendments. One comment suggested clarification of the applicability of amended Rule 30.4(a), because the preamble to the reproposal limited its applicability to FFOBs with foreign futures and foreign options customer omnibus accounts of U.S. FCMs "but [that] have no direct contact with the customers whose accounts comprise the omnibus accounts."[13] The commenter was concerned that the quoted phrase could be read as contradicting Commission Rule 30.12, which permits certain foreign firms to accept and to execute orders directly from U.S. customers without having to register with the Commission. In response to this comment, the Commission emphasizes that the amended Rule 30.4(a) in no way limits the scope of Rule 30.12.

B. U.S. Office

Finally, the Commission is deleting Rule 30.4(e) to eliminate an inconsistency and source of potential confusion. Rule 30.4(e) stated that "persons required to be registered as [an FCM] must maintain an office in the United States which is managed by an individual domiciled in the United States and registered with the Commission as an associated person." Rule 30.4(e) was originally adopted because of a concern that unscrupulous firms might establish their base of operations offshore.[14]

A few months after Rule 30.4(e) was adopted as a provision of the original Part 30 rules, a staff interpretation clarified that a policy basis for the provision was the assurance that a foreign FCM can produce its books and records—but that if it can otherwise demonstrate that capability and its willingness to do so, that is sufficient.[15] NFA implemented this interpretation and it is currently set forth in Rule 802. Paragraph (a)(9)(i) of that rule requires production of records in the U.S. on 72 hours' notice, except that FCMs must produce on 24 hours' notice except for good cause shown. A foreign applicant also certifies, per paragraph (a)(9)(iv), that it is not subject to any blocking, privacy or secrecy laws that would interfere with or create an obstacle to full inspection of the applicant's books and records by the CFTC, the Department of Justice, and NFA.

Although the coverage of Rule 30.4(e) was limited strictly to those persons required to register as FCMs under Rule 30.4 (and therefore engaged in transactions on or subject to the rules of foreign boards of trade), the provision has no counterpart with respect to trades done on designated contract markets by foreign firms, and does not include foreign-based commodity trading advisors (CTAs), commodity pool operators (CPOs) and introducing brokers (IBs).

In light of these factors, the Commission is revoking Rule 30.4(e). The Commission notes that foreign firms seeking to solicit or accept orders and funds related thereto from U.S.-located customers for transactions on non-U.S. exchanges do not apply for registration as FCMs under Rule 30.4, but instead submit the appropriate certification to confirm exemption relief granted by Commission order under Rule 30.10 to the firms' foreign regulator or self-regulatory organization. The Commission also notes that, as of September 30, 2004, there were more than 470 foreign-based IBs, CPOs and CTAs and the Commission has not observed any special concerns as a result.

III. Related Matters

A. Administrative Procedure Act

The Administrative Procedure Act generally requires that, before an agency adopts a rule, the agency provide an opportunity for notice and comment thereon. That opportunity is not required, however, when the agency for good cause finds such procedure unnecessary. The Commission is eliminating Rule 30.4(e) without provision for notice and comment because such procedure is unnecessary, per section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B) (2004). Rule 30.4(e) has never been applied because, as discussed above, foreign firms seeking to solicit or accept orders and funds related thereto from U.S.-located customers for transactions on non-U.S. exchanges do not apply for registration as FCMs under Rule 30.4, but instead submit the appropriate certification to confirm exemption relief granted by Commission order under Rule 30.10 to the firms' foreign regulator or self-regulatory organization. In addition, Rule 30.4(e) may be eliminated because its purposes are now accomplished by NFA's Rule 802, as discussed above.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601–611, requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[16] In proposing these amendments to part 30, the Commission stated that they would affect foreign members of foreign boards of trade who perform the functions of an FCM, some of which may be foreign affiliates of U.S. FCMs. The Commission previously has determined that, based upon the fiduciary nature of the FCM/customer relationships, as well as the requirement that FCMs meet minimum financial requirements, FCMs should be excluded from the definition of small entities. No comment was received regarding the impact of these amendments on small businesses.

C. Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995,[17] the Commission submitted a copy of the proposed rule amendments to the Office of Management and Budget for its review. The Commission did not receive any public comments relative to its analysis of paperwork burdens associated with this rulemaking.

D. Cost-Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, section 15(a) simply requires the Commission to "consider the costs and benefits" of its action. Section 15(a)

[1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,516 (August 15, 1989).

[13] 69 FR 17988 at 17999 (April 6, 2004).

[14] 52 FR 28980 at 28990 (August 5, 1987).

[15] The letter, directed to NFA, stated that it would be "other good cause" to deny registration to a foreign-located firm "unless the applicant has an office in the United States, its territories or possessions, or the applicant is otherwise able to demonstrate that it has adopted appropriate procedures for producing its books and records in the United States expeditiously upon request, and the applicant can and does represent that it will comply with such procedures." Staff Letter 87–10, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,999 (Dec. 9, 1987). (Emphasis in original.)

[16] 47 FR 18618–18621 (April 30, 1982).

[17] Pub. L. 104–13 (May 13, 1995).

further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission published an analysis of costs and benefits when it proposed the rule amendments that have now been adopted.[18] It did not receive any public comments pertaining to the analysis.

List of Subjects in 17 CFR Part 30

Definitions, Foreign futures, Foreign options, Reporting and recordkeeping requirements, Registration requirements.

■ In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act and, in particular, sections 2(a)(1), 4(b), 4c and 8 thereof, 7 U.S.C. 2, 6(b), 6c and 12a, and pursuant to the authority contained in 5 U.S.C. 552 and 552b, the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 30—FOREIGN OPTIONS AND FOREIGN FUTURES TRANSACTIONS

■ 1. The authority citation for part 30 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6, 6c and 12a, unless otherwise noted.

■ 2. Section 30.4 is amended by revising paragraph (a) to read as follows, and by removing paragraph (e):

§ 30.4 Registration required.

* * * * *

(a) To solicit or accept orders for or involving any foreign futures contract or foreign options transaction and, in connection therewith, to accept any money, securities or property (or extend credit in lieu thereof) to margin, guarantee or secure any trades or contracts that result or may result therefrom, unless such person shall have registered, under the Act, with the Commission as a futures commission merchant and such registration shall not have expired nor been suspended nor revoked; *provided that,* a foreign futures and options broker (as defined in § 30.1(e)) is not required to register as a futures commission merchant: one, in order to accept orders from or to carry a U.S. futures commission merchant's foreign futures and options customer omnibus account, as that term is defined in § 30.1(d); two, in order to accept orders from or to carry a U.S. futures commission merchant's proprietary account, as that term is defined in paragraph (y) of § 1.3 of this chapter; and/or three, in order to accept orders from or carry a U.S. affiliate account which is proprietary to the foreign futures and options broker, as "proprietary account" is defined in paragraph (y) of § 1.3 of this chapter. Such foreign futures and options broker remains subject to all other applicable provisions of the Act and of the rules, regulations and orders thereunder. Foreign futures and options brokers that have U.S. bank branches, offices or divisions engaging in the activity listed in this paragraph are not required to register as futures commission merchants if they comply with the conditions listed in § 30.10(b)(1) through (6).

* * * * *

■ 3. Section 30.10 is amended by designating the existing text as paragraph (a) and adding paragraph (b) to read as follows:

§ 30.10 Petitions for exemption.

* * * * *

(b) Any foreign person that files a petition for an exemption under this section shall be eligible for such an exemption notwithstanding its presence in the United States through U.S. bank branches or divisions if, in conjunction with a petition for confirmation of relief granted under an existing Commission order issued pursuant to this section, it complies with the following conditions:

(1) No U.S. bank branch, office or division will engage in the trading of futures or options on futures within or from the United States, except for its own proprietary account;

(2) No U.S. bank branch, office or division will refer any foreign futures or foreign options customer to the foreign person or otherwise be involved in the foreign person's business in foreign futures or foreign option transactions;

(3) No U.S. bank branch, office or division will solicit any foreign futures or foreign option business or purchase or sell foreign futures or foreign option contracts on behalf of any foreign futures or foreign option customers or otherwise engage in any activity subject to regulation under this part or engage in any clerical duties related thereto. If any U.S. division, office or branch desires to engage in such activities, it will only do so through an appropriate Commission registrant;

(4) The foreign person will maintain outside the United States all contract documents, books and records regarding foreign futures and foreign option transactions;

(5) The foreign person and each of its U.S. bank branches, offices or divisions agree to provide upon request of the Commission, the National Futures Association or the U.S. Department of Justice, access to their books and records for the purpose of ensuring compliance with the foregoing undertakings and consent to make such records available for inspection at a location in the United States within 72 hours after service of the request; and

(6) Although it will continue to engage in normal commercial activities, no U.S. bank branch, office or division of the foreign person will establish relationships in the United States with the applicant's foreign futures or foreign option customers for the purpose of facilitating or effecting transactions in foreign futures or foreign option contracts.

Dated: August 4, 2004.

By the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–18344 Filed 8–11–04; 8:45 am]

BILLING CODE 6351–01–P

[18] 69 FR 17988 at 18000 (April 6, 2004).

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33–8454; 34–50160; 35–27881; 39–2424; IC–26525]

RIN 3235–AG96

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions are being made primarily to support the redesign of Form 8–K, where the reportable events have been expanded from 12 to 22 items, a new

hierarchical numbering scheme has been introduced for the reportable events (items), and the fact that the 8–K can be filed to simultaneously satisfy some filing obligations for Rules 425, 14a–12, 14d–2(b) and 13e–4(c). Revisions are also being made to provide support for EDGARLink on Windows® XP, in addition to existing support for Windows® 98, 2000 and NT; to provide support for modified exhibit descriptions for Regulations S–K and S–B; for discontinued support for submission Form types 40–8F–A, 40–8F–B, 40–8F–L, 40–8F–M and their amendments; to provide support for the electronic filing of submission Form types 40–17G, 40–17GCS, 40–24B2, 40–33 and their amendments; and, the ability to enter multiple classes (contracts) for a series at one time from a single web page.

The revisions to the Filer Manual reflect changes within Volumes I, II and III, entitled "EDGAR Release 8.8 EDGARLink Filer Manual," "EDGAR Release 8.8 N–SAR Supplement Filer Manual," and "EDGAR Release 8.8 OnlineForms Filer Manual" respectively. The updated manual will be incorporated by reference into the Code of Federal Regulations.

EFFECTIVE DATE: August 23, 2004. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of August 23, 2004.

FOR FURTHER INFORMATION CONTACT: In the Office of Information Technology, Rick Heroux, at (202) 942–8800; for questions concerning the Division of Investment Management filings, in the Division of Investment Management, Ruth Armfield Sanders, Senior Special Counsel, at (202) 942–0978; for questions concerning the Division of Corporation Finance filings, in the Division of Corporation Finance, Herbert Scholl, Office Chief, EDGAR and Information Analysis, at (202) 942–2940; and, in the Office of Filings and Information Services, Margaret A. Favor, (202) 942–8900.

SUPPLEMENTARY INFORMATION: Today we are adopting an updated EDGAR Filer Manual (Filer Manual). The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using modernized EDGARLink.[2]

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers should consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

We will implement EDGAR Release 8.8 on August 23, 2004, to support the redesign of Form 8–K,[5] where the reportable events have been expanded from 12 to 22 items, a new hierarchical numbering scheme has been introduced for the reportable events (items), and the fact that the 8–K can be filed to simultaneously satisfy some filing obligations for Rules 425, 14a–12, 14d–2(b) and 13e–4(c). Revisions are also being made to provide support for EDGARLink on Windows® XP, in addition to existing support for Windows® 98, 2000 and NT; to no longer support EDGARLink under Windows® 95; to provide support for modified exhibit descriptions for Regulations S–K and S–B, where both Regulations S–K and S–B descriptions are shown for each exhibit number, the descriptions have changed for Exhibits 7 and 17 and Exhibits 6 and 28 have been removed as valid exhibits.

We are discontinuing support for submission types 40–8F–A, 40–8F–B, 40–8F–L, and 40–8F–M and their amendments. In their place, filers will use new submission types N–8F and N–8F/A to submit their Forms N–8F and amendments. Those filers needing to file amendments to filings previously submitted on submission types 40–8F–A, 40–8F–B, 40–8F–L, or 40–8F–M may do so using new submission type N–8F/A.

Earlier this year, we proposed[6] to amend to Rule 101 of Regulation S–T[7] to make mandatory the electronic submission by investment companies of fidelity bonds under Section 17(g),[8] sales literature filed with us under Section 24(b),[9] and litigation material filed under Section 33 of the Investment Company Act.[10] While we have not yet adopted our proposed amendment to Rule 101, we are adding electronic filing of submission types 40–17G, 40–17GCS, 40–24B2, and 40–33 and their amendments so that filers may begin making these filings electronically on a voluntary basis. At this time, we will continue to accept paper submissions of these filings.

This year we also proposed that certain open-end management investment companies and insurance company separate accounts identify in their EDGAR submissions information relating to their series and classes (or contracts, in the case of separate accounts).[11] The new series and class page is now operational on the EDGAR Filing Web site *https://www.edgarfiling.sec.gov/*. Since the series and class page is live, filers who filed their latest registration statements or amendments on Form N–1A, N–3, N–4, or N–6 may use the page to enter information for their series and classes (contracts); filers who do so will be issued series and classes (contracts) identifiers. However, using the page and obtaining identifiers is not mandatory at this time. Obtaining identifiers will not become mandatory unless and until we act through a formal rulemaking to adopt the series and class requirements that we proposed.[12] In this release, we

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33–6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on April 26, 2004. *See* Release No. 33–8409 (April 19, 2004) [69 FR 21954].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] *See* Rule 301 of Regulation S–T (17 CFR 232.301).

[4] *See* Release Nos. 33–6977 (February 23, 1993) [58 FR 14628], IC–19284 (February 23, 1993) [58 FR 14848], 35–25746 (February 23, 1993) [58 FR 14999], and 33–6980 (February 23, 1993) [58 FR 15009] in which we comprehensively discuss the rules we adopted to govern mandated electronic filing. *See also* Release No. 33–7122 (December 19, 1994) [59 FR 67752], in which we made the EDGAR rules final and applicable to all domestic registrants; Release No. 33–7427 (July 1, 1997) [62 FR 36450], in which we adopted minor amendments to the EDGAR rules; Release No. 33–7472 (October 24, 1997) [62 FR 58647], in which we announced that, as of January 1, 1998, we would not accept in paper filings that we require filers to submit electronically; Release No. 34–40934 (January 12, 1999) [64 FR 2843], in which we made mandatory the electronic filing of Form 13F; Release No. 33–7684 (May 17, 1999) [64 FR 27888], in which we adopted amendments to implement the first stage of EDGAR modernization; Release No. 33–7855 (April 24, 2000) [65 FR 24788], in which we implemented EDGAR Release 7.0; Release No. 33–7999 (August 7, 2001) [66 FR 42941], in which we implemented EDGAR Release 7.5; Release No. 33–8007 (September 24, 2001) [66 FR 49829], in which we implemented EDGAR Release 8.0; Release No. 33–8224 (April 30, 2003) [66 FR 24345], in which we implemented EDGAR Release 8.5; Release Nos. 33–8255 (July 22, 2003) [68 FR 44876] and 33–8255A (September 4, 2003) [68 FR 53289] in which we implemented EDGAR Release 8.6; and Release No. 33–8409 (April 19, 2004) [69 FR 21954] in which we implemented EDGAR Release 8.7.

[5] *See* Release Nos. 33–8400 (March 16, 2004) [69 FR 15594] and 33–8400A (August 4, 2004).

[6] *See* "Rulemaking for EDGAR System," Release 33–8401 (March 16, 2004) [69 FR 13690 (March 23, 2004)].

[7] 17 CFR 232.101.

[8] 15 U.S.C. 80a–17(g).

[9] 15 U.S.C. 80a–24(b).

[10] 15 U.S.C. 80a–31.

[11] *See* Release 33–8401.

[12] *See* Release 33–8401 and Appendix J to the EDGAR Filer Manual for further information. Please note that, before a registrant may use the series and

are revising the series and class page to make it more user friendly. We have added the ability for investment companies to enter multiple classes (contracts) for a series at one time from a single web page.

For EDGAR Release 8.8, the EDGARLink software and submission templates 1, 2, 3 and 5 will be updated to support Windows® XP, in addition to Windows® NT, 2000, and Windows® 98, and the aforementioned submission form type changes. It is highly recommended that filers download, install, and use the new EDGARLink software and submission templates to ensure that submissions will be processed successfully; filers who wish to use EDGARLink on Windows® XP must download the new version and new templates. Previous versions of the templates may not work properly. EDGARLink will no longer be supported on Windows® 95. Notice of the update has previously been provided on the EDGAR Filing Web site and on the Commission's public Web site. The discrete updates are reflected on the EDGAR Filing Web site and in the updated Filer Manual Volumes.

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549–0102. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.* You may also obtain copies from Thomson Financial Inc., the paper and microfiche contractor for the Commission, at (800) 638–8241.

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).[13] It follows that the requirements of the Regulatory Flexibility Act[14] do not apply.

The effective date for the updated Filer Manual and the rule amendments is August 23, 2004. In accordance with the APA,[15] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 8.8 is scheduled to become available on August 23, 2004. The Commission believes that it is necessary to coordinate the effectiveness of the updated Filer Manual with the scheduled system upgrade.

Statutory Basis

We are adopting the amendments to Regulation S–T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[16] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[17] Section 20 of the Public Utility Holding Company Act of 1935,[18] Section 319 of the Trust Indenture Act of 1939,[19] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[20]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

Text of the Amendment

■ In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79t(a), 80a–8, 80a–29, 80a–30 and 80a–37.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for filers using modernized EDGARLink are set forth in the EDGAR Release 8.8 EDGARLink Filer Manual Volume I, dated August 2004. Additional provisions applicable to Form N–SAR filers and Online Forms filers are set forth in the EDGAR Release 8.8 N–SAR Supplement Filer Manual Volume II, dated August 2004, and the EDGAR Release 8.8 OnlineForms Filer Manual Volume III, dated August 2004. All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0102 or by calling Thomson Financial Inc at (800) 638–8241. Electronic format copies are available on the Commission's Web site. The address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.* You can also photocopy the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Dated: August 6, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18413 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

class page, it must make sure it has only one CIK. Those 1940 Act registrants for whom we proposed to require identifiers for their series and classes (or contracts, in the case of separate accounts) (*i.e.*, Form N–1A, N–3, N–4 and N–6 registrants) must submit their 1940 Act filings under only one 1940 Act number (811-) and one CIK. (Registrants may have multiple 1933 Act numbers under a single CIK.) Any 1940 Act registrant wishing to obtain identifiers who has more than one 1940 Act number or more than one CIK must call the IM EDGAR Inquiry Line at 202–942–0978 for assistance before proceeding on the series and class page.

[13] 5 U.S.C. 553(b).

[14] 5 U.S.C. 601–612.

[15] 5 U.S.C. 553(d)(3).

[16] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[17] 15 U.S.C. 78c, 78*l*, 78m, 78n, 78o, 78w, and 78*ll*.

[18] 15 U.S.C. 79t.

[19] 15 U.S.C. 77sss.

[20] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239 and 274

[Release Nos. 33–8393A; 34–49333A; IC–26372A; File No. S7–51–02]

RIN 3235–AG64

Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies; Technical Amendment

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; Technical amendment to a form.

SUMMARY: The Securities and Exchange Commission is adopting a technical

amendment to Item 21(d)(1) of Form N–1A, which was published in the **Federal Register** on Tuesday, March 9, 2004 (69 FR 11244). The amendment corrects an instruction to the requirement for a registered open-end management investment company to include in its shareholder reports disclosure of fund expenses borne by shareholders during the reporting period.

EFFECTIVE DATE: August 12, 2004.

FOR FURTHER INFORMATION CONTACT: John Faust, Attorney, Office of Disclosure Regulation, Division of Investment Management, (202) 942–0721, at the Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION:

I. Background

The Securities and Exchange Commission ("Commission") recently issued a release adopting amendments to Form N–1A that require registered open-end management investment companies to disclose in their reports to shareholders fund expenses borne by shareholders during the reporting period ("Adopting Release").[1] The amendments require shareholder reports to include: (1) The cost in dollars associated with an investment of $1,000, based on the fund's actual expenses and return for the period; and (2) the cost in dollars associated with an investment of $1,000, based on the fund's actual expenses for the period and an assumed return of 5 percent per year. The requirements for the expense examples include an instruction to round all dollar figures to the nearest dollar.[2]

The purpose of the expense examples is to increase investors' understanding of the fees that they pay on an ongoing basis for investing in a fund, and to facilitate comparison of ongoing expenses among funds.[3] In adopting the requirement for the expense examples, we required the examples to be based on an initial investment of $1,000, rather than $10,000 as proposed, but did not reconsider the rounding instruction.[4] Subsequent to the adoption of the rule, we have become aware that, in some cases, rounding expenses paid on a $1,000 investment to the nearest dollar may result in insufficiently precise expense figures. Such figures would not facilitate investors' ability to estimate their own expenses and to compare the costs of different funds. This will tend to affect funds with relatively low expense ratios disproportionately. For example, an investor in a fund with an annual expense ratio of 0.10% would pay $0.51 in expenses for a $1,000 initial investment over a half-year period (assuming a 5% annual return for the period). An investor in a fund with an annual expense ratio of 0.29% would pay $1.47 in expenses for a $1,000 investment over a half-year period (assuming a 5% annual return for the period). However, under the requirements we adopted, these two funds would both show rounded expenses of $1.00, even though the expense ratio for the second fund is almost three times as large as that of the first fund. In addition, an investor who used this $1.00 expense figure to estimate his or her own expenses for an investment in either of the two funds would significantly underestimate or overestimate expenses. For example, an investor with a $25,000 initial investment in each of the two funds would calculate his or her expenses to be $25.00 ($25,000/$1,000 × $1.00) for each fund, while a calculation based on expense figures rounded to the nearest cent would result in estimates of $12.75 ($25,000/$1,000 × $0.51) and $36.75 ($25,000/$1,000 × $1.47), respectively.

The Commission is adopting a technical amendment to Instruction 1(a) of Item 21(d)(1) of Form N–1A to require funds to round all figures in the table of expense examples to the nearest cent. In light of the change to the initial investment amount, we have concluded that it is appropriate to require rounding to the nearest cent, rather than the nearest dollar.

II. Certain Findings

Under the Administrative Procedure Act ("APA"), notice of proposed rulemaking is not required when the agency, for good cause, finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[5] The Commission is making a technical amendment to Form N–1A to effect the intent of the Commission as expressed in both the proposing and adopting releases. This amendment will make a minor change in the presentation of the expense example in shareholder reports, which will have no effect on the burden on funds of performing the calculation required. For the foregoing reasons, the Commission finds that publishing the changes for comment is unnecessary.[6]

The APA also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[7] However, an agency may forgo the 30-day requirement if it finds good cause for doing so.[8] For the same reasons that the notice and comment period is not required, the Commission finds good cause for the amendment to take effect immediately. The Adopting Release required all fund reports to shareholders for periods ending on or after July 9, 2004, to comply with the amendments in that release, including the requirement for expense examples.[9] Therefore, any such shareholder report transmitted on or after the date of this release must also comply with this amendment.

III. Statutory Authority

The Commission is adopting amendments to Form N–1A pursuant to authority set forth in sections 5, 6, 7, 10, 19(a), and 28 of the Securities Act of 1933 [15 U.S.C. 77e, 77f, 77g, 77j, 77s(a), and 77z–3]; sections 10(b), 13, 15(d), and 23(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b), 78m, 78o(d), and 78w(a)]; and sections 6(c), 8, 24(a), 30, and 38 of the Investment Company Act of 1940 [15 U.S.C. 80a–6(c), 80a–8, 80a–24(a), 80a–29, and 80a–37].

List of Subjects

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Form Amendment

■ For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

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[1] Investment Company Act Release No. 26372 (Feb. 27, 2004) [69 FR 11244 (Mar. 9, 2004] ("Adopting Release").

Form N–1A is the registration form used by open-end management investment companies to register under the Investment Company Act of 1940 and to offer their shares under the Securities Act of 1933.

[2] Instruction 1(a) to Item 21(d)(1) of Form N–1A.

[3] Adopting Release, *supra* note 1, 69 FR at 11246.

[4] *See* Adopting Release, *supra* note 1, 69 FR at 11247.

[5] 5 U.S.C. 553(b).

[6] For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or analysis of major status under the Small Business Regulatory Enforcement Fairness Act. *See* 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analyses, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking); 5 U.S.C. 804(3)(C) (for purposes of congressional review of agency rulemaking, the term "rule" does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties).

[7] 5 U.S.C. 553(d).

[8] *Id.*

[9] *See* Adopting Release, *supra* note 1, 69 FR at 11254.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 1. The general authority citation for Part 239 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 2. The authority citation for part 274 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

■ 3. Instruction 1(a) to Item 21(d)(1) of Form N–1A (referenced in §§ 239.15A and 274.11A) is amended to read as follows:

Note: The text of Form N–1A does not and this amendment will not appear in the *Code of Federal Regulations.*

Form N–1A

* * * * *

Item 21. Financial Statements

* * * * *

(d) * * *

(1) * * *

Instructions.

1. *General.*

(a) Round all figures in the table to the nearest cent.

* * * * *

Dated: August 9, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18449 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 17

[Docket No. 2003N–0308]

Civil Money Penalties Hearings; Maximum Penalty Amounts and Compliance With the Federal Civil Penalties Inflation Adjustment Act; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that published in the **Federal Register** of July 20, 2004 (69 FR 43299). The document issued a regulation to adjust for inflation the maximum civil money penalty amounts for various civil money penalty authorities within our jurisdiction. The document published with some errors and this document corrects those errors.

DATES: The rule is effective September 20, 2004.

FOR FURTHER INFORMATION CONTACT: Joyce A. Strong, Office of Policy (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville MD, 20857, 301–827–7010.

SUPPLEMENTARY INFORMATION: In FR Doc. 04–16388, appearing on page 43299 in the **Federal Register** of Tuesday, July 20, 2004, the following corrections are made:

§ 17.2 [Corrected]

1. On pages 43301 and 43302, in the last column of the table (in dollars), paragraphs (a)(4), (a)(11), and (a)(12) are corrected to read: 16,500, 1,100, and 330,000, respectively. For the convenience of the reader, the table is republished in its entirety:

CIVIL MONETARY PENALTIES AUTHORITIES ADMINISTERED BY FDA AND ADJUSTED MAXIMUM PENALTY AMOUNTS

U.S.C. Section	Description of Violation	Former Maximum Penalty Amount (in dollars)	Assessment Method	Date of Last Penalty	Adjusted Maximum Penalty Amount (in dollars)
(a) 21 U.S.C.					
(1) 333(b)(2)(A)	Violation of certain requirements of the Prescription Drug Marketing Act (PDMA)	50,000	For each of the first two violations in any 10-year period	2004	55,000
(2) 333(b)(2)(B)	Violation of certain requirements of the PDMA	1,000,000	For each violation after the second conviction in any 10-year period	2004	1,100,000
(3) 333(b)(3)	Violation of certain requirements of the PDMA	100,000	Per violation	2004	110,000
(4) 333(f)(1)(A)	Violation of certain requirements of the Safe Medical Devices Act (SMDA)	15,000	Per violation	2004	16,500
(5) 333(f)(1)(A)	Violation of certain requirements of the SMDA	1,000,000	For the aggregate of violations	2004	1,100,000
(6) 333(f)(2)(A)	Violation of certain requirements of the Food Quality Protection Act of 1996 (FQPA)	50,000	Per individual	2004	55,000
(7) 333(f)(2)(A)	Violation of certain requirements of the FQPA	250,000	Per "any other person"	2004	275,000
(8) 333(f)(2)(A)	Violation of certain requirements of the FQPA	500,000	For all violations adjudicated in a single proceeding	2004	550,000

CIVIL MONETARY PENALTIES AUTHORITIES ADMINISTERED BY FDA AND ADJUSTED MAXIMUM PENALTY AMOUNTS—Continued

U.S.C. Section	Description of Violation	Former Maximum Penalty Amount (in dollars)	Assessment Method	Date of Last Penalty	Adjusted Maximum Penalty Amount (in dollars)
(9) 335b(a)	Violation of certain requirements of the Generic Drug Enforcement Act of 1992 (GDEA)	250,000	Per violation for an individual	2004	275,000
(10) 335b(a)	Violation of certain requirements of the GDEA	1,000,000	Per violation for "any other person"	2004	1,100,000
(11) 360pp(b)(1)	Violation of certain requirements of the Radiation Control for Health and Safety Act of 1968 (RCHSA)	1,000	Per violation per person	2004	1,100
(12) 360pp(b)(1)	Violation of certain requirements of the RCHSA	300,000	For any related series of violations	2004	330,000
(b) 42 U.S.C.					
(1) 263b(h)(3)	Violation of certain requirements of the Mammography Quality Standards Act of 1992 and the Mammography Quality Standards Act of 1998	10,000	Per violation	2004	11,000
(2) 300aa–28(b)(1)	Violation of certain requirements of the National Childhood Vaccine Injury Act of 1986	100,000	Per occurrence	2004	110,000

Dated: August 5, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–18407 Filed 8–11–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Ivermectin and Praziquantel Paste

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Merial Ltd. The supplemental NADA provides revised labeling for ivermectin and praziquantel oral paste used in horses for the treatment and control of various internal parasites.

DATES: This rule is effective August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Martine Hartogensis, Center for Veterinary Medicine (HFV–216), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–7815, e-mail: *martine.hartogensis@fda.gov.*

SUPPLEMENTARY INFORMATION: Merial Ltd., 3239 Satellite Blvd., Bldg. 500, Duluth, GA 30096–4640, filed a supplement to NADA 141–214 for ZIMECTERIN GOLD (ivermectin 1.55 percent/praziquantel 7.75 percent) Paste for horses. This supplement amends product labeling to separate parasite life stages in the indications section, to remove the 8-week retreatment interval from the dosage and administration section, and to add a new precaution statement. The supplemental NADA is approved as of July 13, 2004, and 21 CFR 520.1198 is amended to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. Section 520.1198 is amended by revising paragraphs (d)(2)(i) and (d)(3) to read as follows:

§ 520.1198 Ivermectin and praziquantel paste.

* * * * *

(d) * * *

(2) * * *

(i) For treatment and control of the following parasites in horses: Tapeworms—*Anoplocephala perfoliata*; Large strongyles (adults)—*Strongylus vulgaris* (also early forms in blood vessels), *S. edentatus* (also tissue stages), *S. equinus*, *Triodontophorus* spp. including *T. brevicauda* and *T. serratus*, and *Craterostomum acuticaudatum*; Small Strongyles (adults, including those resistant to some benzimidazole class compounds)—*Coronocyclus* spp. including *C. coronatus*, *C. labiatus*, and *C. labratus*, *Cyathostomum* spp. including *C. catinatum* and *C. pateratum*, *Cylicocyclus* spp. including *C. insigne*, *C. leptostomum*, *C. nassatus*, and *C. brevicapsulatus*, *Cylicodontophorus* spp., *Cylicostephanus* spp. including *C. calicatus*, *C. goldi*, *C. longibursatus*, and *C. minutus*, and *Petrovinema poculatum*; Small Strongyles—fourth-stage larvae; Pinworms (adults and fourth stage larvae)—*Oxyuris equi*; Ascarids (adults and third- and fourth-stage larvae)—*Parascaris equorum*; Hairworms (adults)—*Trichostrongylus axei*; Large-mouth Stomach Worms (adults)—*Habronema muscae*; Bots (oral and gastric stages)—*Gasterophilus* spp. including *G. intestinalis* and *G. nasalis*; Lungworms (adults and fourth-stage larvae)—*Dictyocaulus arnfieldi*; Intestinal Threadworms (adults)—*Strongyloides westeri*; Summer Sores caused by *Habronema* and *Draschia* spp. cutaneous third-stage larvae; Dermatitis caused by neck threadworm microfilariae, *Onchocerca* sp.

* * * * *

(3) *Limitations.* For oral use only. Do not use in horses intended for human consumption.

Dated: July 27, 2004.

Daniel G. McChesney,

Director, Office of Surveillance and Compliance, Center for Veterinary Medicine.

[FR Doc. 04–18406 Filed 8–11–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9153]

RIN 1545–BD43

Clarification of Definitions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary regulations providing clarification of the definitions of a corporation and a domestic entity in circumstances where the business entity is considered to be created or organized in more than one jurisdiction. These regulations will affect business entities that are created or organized under the laws of more than one jurisdiction. The final regulations consist of technical revisions to reflect the issuance of the temporary regulations and to correct a cross-reference in § 301.7701–3. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective August 12, 2004.

Applicability Dates: For the dates of applicability of these regulations, see § 301.7701–2T(f) and § 301.7701–5T(c).

FOR FURTHER INFORMATION CONTACT: Thomas Beem, (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Several jurisdictions have recently enacted provisions (generally referred to as either continuance or domestication statutes) that make it possible for a business entity to be treated as created or organized under the laws of more than one jurisdiction at the same time (a dually chartered entity). A dually chartered entity and the interest holders in the entity must determine for Federal tax purposes (1) the entity's classification (*e.g.*, corporation or partnership) and (2) whether the entity is foreign or domestic. The regulations contained in this document are intended to clarify the rules for these determinations.

Section 7701(a)(3) of the Internal Revenue Code of 1986 (Code) provides that the term *corporation* includes associations, joint stock companies, and insurance companies. The definition of a corporation under the tax statutes has not changed since the Revenue Act of 1918, Public Law 65–254 (40 Stat. 1057, section 1). Final regulations (TD 8697) providing rules for the classification of business entities were published in the **Federal Register** on December 18, 1996 (61 FR 66584 (1996)). Those entity classification rules identify certain entities that are always treated as corporations and are not eligible to elect their entity classification.

Section 7701(a)(4) of the Code provides that the term *domestic* when applied to a corporation or partnership means "created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations." Section 7701(a)(5) of the Code provides that the term *foreign* when applied to a corporation or partnership means a "corporation or partnership that is not domestic." This definition is significantly different than the definition of foreign entity that preceded it. The Revenue Act of 1918 used the term foreign to mean a corporation or partnership "created or organized outside the United States." Thus, under that definition, a dually chartered entity that was organized in the United States and in a foreign jurisdiction would have met the definitions of both a domestic entity and a foreign entity, creating uncertainty as to the entity's status. The Revenue Act of 1924, Public Law 68–176 (43 Stat. 253) eliminated that potential for uncertainty by providing the definition of a foreign entity that is currently reflected in section 7701(a)(5). This definition of a foreign entity as "a corporation or partnership that is not domestic" makes it impossible for an entity to meet the definitions of both a domestic entity and a foreign entity for Federal tax purposes at the same time. As a result, a dually chartered entity that is organized both in the United States and in a foreign jurisdiction is a domestic entity.

Final regulations providing further guidance on the definitions of domestic and foreign business entities were published in the **Federal Register** on November 17, 1960 (25 FR 10928 (1960)).

Explanation of Provisions

Under the existing rules, the characterization of a business entity for Federal tax purposes is established in two separate and independent steps. The first involves a determination of whether the entity is a corporation or a non-corporate entity (*e.g.*, a partnership). The second involves a determination of whether the entity is foreign or domestic.

The determination of whether a business entity is classified as a corporation is made by applying the definition in § 301.7701–2(b). If the entity is not a corporation under that definition, then it is a partnership if it has more than one owner and it is a disregarded entity if it has only a single owner. The temporary regulations in this document clarify that this same definition applies to dually chartered entities. Thus, to determine whether a dually chartered entity is a corporation,

it must first be determined if the entity's organization in any of the jurisdictions in which it is organized would cause it to be treated as a corporation under the rules of § 301.7701–2(b). If the entity would be treated as a corporation as a result of its formation in any of the jurisdictions in which it is organized, it is treated as a corporation for Federal tax purposes even though its organization in the other jurisdiction or jurisdictions would not have caused it to be treated as a corporation.

Once the classification of a business entity has been determined, a determination will generally need to be made regarding whether it is a domestic or foreign entity. It is a domestic entity if it is created or organized in the United States or under the laws of the United States or of any state. It is a foreign entity only if it is not domestic. The temporary regulations in this document revise § 301.7701–5 to clarify that a dually chartered entity is domestic if it is organized as any form of entity in the United States, regardless of how it is organized in any foreign jurisdiction. An entity that is classified as a corporation because of its form of organization in a foreign country is considered a domestic corporation if it is also organized as some form of entity in the United States, regardless of what form the entity takes in the United States (*e.g.*, corporation, limited liability company, or partnership).

These temporary regulations also remove from § 301.7701–5 the definitions of resident foreign corporation, nonresident foreign corporation, resident partnership and nonresident partnership because these terms have become obsolete due to statutory changes since the final regulations were published in 1960.

These regulations clarify current law and do not change the outcome that would result under a proper application of the existing rules as they apply to dually chartered entities. For example, the temporary regulations are consistent with the result in Rev. Rul. 88–25 (1988–1 C.B. 116). These regulations are also not intended to affect the result under existing rules regarding whether an organization is a separate entity for Federal tax purposes (*e.g.*, whether, in a particular case, two sets of organizational documents constitute different facets of a single entity or the foundations of two separate entities). In addition, if a business entity undertakes a continuance, domestication, or other transaction that, upon application of these rules, changes its entity classification or changes its foreign or domestic status, the tax effects of that transaction are determined under the regular tax principles that apply to such changes. Finally, the regulations contained in this document do not determine an entity's place of residence for the purpose of applying the provisions of a tax treaty.

Section 7701(a)(4) of the Code provides regulatory authority to define a domestic partnership other than based on where the partnership is created or organized. The Treasury and the IRS are continuing to explore whether, and under what circumstances, a different definition may be appropriate. If any change to the definition of a domestic partnership were to be proposed, it would apply only to partnerships created or organized after the issuance of regulations or other guidance substantially describing the change in definition.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the notice of proposed rulemaking published in the proposed rules section in this issue of the **Federal Register**. Pursuant to section 7806(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact.

Drafting Information

The principal author of these regulations is Thomas Beem of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and Recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** In § 301.7701–1, paragraph (d) is revised to read as follows:

§ 301.7701–1 Classification of organizations for federal tax purposes.

* * * * *

(d) *Domestic and foreign business entities.* [Reserved]. For further guidance, see § 301.7701–1T.

* * * * *

■ **Par 3.** Section 301.7701–1T is added to read as follows:

§ 301.7701–1T Classification of organizations for federal tax purposes (temporary).

(a) through (c) [Reserved]. For further guidance, see § 301.7701–1(a) through (c).

(d) *Domestic and foreign entities.* See § 301.7701–5T for the rules that determine whether a business entity is domestic or foreign.

(e) through (f) [Reserved].

■ **Par. 4.** In § 301.7701–2, paragraph (b)(9) is added to read as follows:

§ 301.7701–2 Business entities; definitions.

* * * * *

(b) * * *

(9) [Reserved]. For further guidance, see § 301.7701–2T(b)(9).

* * * * *

■ **Par. 5.** Section 301.7701–2T is added to read as follows:

§ 301.7701–2T Business entities; definitions (temporary).

(a) through (b)(8) [Reserved] For further guidance, see § 301.7701–2 (a) through (b)(8).

(b)(9) *Entities with multiple charters.* (i) An entity created or organized under the laws of more than one jurisdiction if the rules of this section would treat it as a corporation as a result of its formation in any one of the jurisdictions in which it is created or organized. (The determination of a business entity's classification is made independently of the determination whether the entity is domestic or foreign. *See* § 301.7701–5T for the rules that determine whether a business entity is domestic or foreign.)

(ii) *Examples.* The following examples illustrate the rule of this paragraph (b)(9):

Example 1. (i) *Facts.* X is an entity with a single owner organized under the laws of Country A as an entity that is specifically mentioned in paragraph (b)(8)(i) of this section. Under the rules of this section, such an entity generally is a corporation for Federal tax purposes. Several years after its formation, X files a certificate of domestication in State B as a limited liability company (LLC). Under the laws of State B,

X is considered to be created or organized in State B as a LLC upon the filing of the certificate of domestication and is therefore subject to the laws of State B. Under the rules of this section and § 301.7701–3, a LLC with a single owner organized only in State B is disregarded as an entity separate from its owner for Federal tax purposes (absent an election to be treated as an association). Neither Country A nor State B law requires X to terminate its charter in Country A as a result of the domestication, and in fact X does not terminate its charter in Country A. Consequently, X is now organized in more than one jurisdiction.

(ii) *Result.* X remains organized under the laws of Country A as an entity that is specifically mentioned in § 301.7701–2(b)(8)(i), and as such, it is an entity that generally is treated as a corporation under the rules of this section. Therefore, X is a corporation for Federal tax purposes because the rules of this section would treat X as a corporation as a result of its formation in one of the jurisdictions in which it is created or organized.

Example 2. (i) *Facts.* Y is an entity that is incorporated under the laws of State A and that has two shareholders. Under the rules of this section, an entity incorporated under the laws of State A is a corporation for Federal tax purposes. Several years after its formation, Y files a certificate of continuance in Country B as an unlimited company. Under the laws of Country B, upon filing a certificate of continuance, Y is treated as organized in Country B. Under the rules of this section and § 301.7701–3, an unlimited company organized only in Country B that has more than one owner is treated as a partnership for Federal tax purposes (absent an election to be treated as an association). Neither State A nor Country B law requires Y to terminate its charter in State A as a result of the continuance, and in fact Y does not terminate its charter in State A. Consequently, Y is now organized in more than one jurisdiction.

(ii) *Result.* Y remains organized in State A as a corporation, an entity that is treated as a corporation under the rules of this section. Therefore, Y is a corporation for Federal tax purposes because the rules of this section would treat Y as a corporation as a result of its formation in one of the jurisdictions in which it is created or organized.

Example 3. (i) *Facts.* Z is an entity that has more than one owner and that is recognized under the laws of Country A as an unlimited company organized in Country A. Under the rules of this section and § 301.7701–3, an unlimited company organized only in Country A with more than one owner is treated as a partnership for Federal tax purposes (absent an election to be treated as an association). At the time Z was formed, it was also organized as a public limited company under the laws of Country B. Under the rules of this section, a public limited company organized only in Country B generally is treated as a corporation for Federal tax purposes.

(ii) *Result.* Z is organized in Country B as a public limited company, an entity that generally is treated as a corporation under the rules of this section. Therefore, Z is a corporation for Federal tax purposes because the rules of this section would treat Z as a corporation as a result of its formation in one of the jurisdictions in which it is created or organized.

(c) through (e) [Reserved]. For further guidance, see § 301.7701–2(c) through (e).

(f) *Special effective date.* The rules of this section apply as of August 12, 2004 to all business entities existing on or after that date.

■ **Par. 6.** In § 301.7701–3, the last sentence of paragraph (b)(3)(i) is revised to read as follows:

§ 301.7701–3 Classification of certain business entities.

* * * * *

(b) * * *

(3) * * * (i) * * *For special rules regarding the classification of such entities prior to the effective date of this section, see paragraph (h)(2) of this section.

* * * * *

■ **Par. 7.** Section 301.7701–5 is revised to read as follows:

§ 301.7701–5 Domestic and foreign business entities. [Reserved]. For further guidance, see § 301.7701–5T.

■ **Par. 8.** Section 301.7701–5T is added to read as follows:

§ 301.7701–5T Domestic and foreign business entities (temporary).

(a) *Domestic and foreign entities.* A business entity (including an entity that is disregarded as separate from its owner) is domestic if it is created or organized as any type of entity (including, but not limited to, a corporation, unincorporated association, general partnership, limited partnership, and limited liability company) in the United States, or under the law of the United States or of any State. Accordingly, a business entity that is created or organized both in the United States and in a foreign jurisdiction is a domestic entity. A business entity (including an entity that is disregarded as separate from its owner) is foreign if it is not domestic. (The determination of whether an entity is domestic is made independently of the determination of its classification for Federal tax purposes. See §§ 301.7701–2, 301.7701–2T, and 301.7701–3 for the rules governing the classification of entities.)

(b) *Examples.* The following examples illustrate the rules of this section:

Example 1. (i) *Facts.* Y is an entity that is created or organized under the laws of Country A as a public limited company. It is also an entity that is organized as a limited liability company (LLC) under the laws of State B. Y has been classified as a corporation for Federal tax purposes under the rules of §§ 301.7701–2, 301.7701–2T, and 301.7701–3.

(ii) *Result.* Y is a domestic corporation because it is an entity that is classified as a corporation and it is organized as an entity under the laws of State B.

Example 2. (i) *Facts.* P is an entity with more than one owner organized under the laws of Country A as an unlimited company. It is also an entity that is organized as a general partnership under the laws of State B. P has been classified as a partnership for Federal tax purposes under the rules of §§ 301.7701–2, 301.7701–2T, and 301.7701–3.

(ii) *Result.* P is a domestic partnership because it is an entity that is classified as a partnership and it is organized as an entity under the laws of State B.

(c) *Effective date.* The rules of this section apply as of August 12, 2004 to all business entities existing on or after that date.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 21, 2004.

Gregory Jenner,

Acting Assistant Secretary of the Treasury.

[FR Doc. 04–18478 Filed 8–11–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–04–144]

RIN 1625–AA08

Special Local Regulations for Marine Events; Delaware River, Philadelphia, PA

AGENCY: Coast Guard, DHS.

ACTION: Notice of implementation of regulation.

SUMMARY: The Coast Guard is implementing the special local regulations at 33 CFR 100.509 during the Labor Day Fireworks Show to be held September 6, 2004, on the Delaware River at Philadelphia, Pennsylvania. These special local regulations are necessary to provide for the safety of life on navigable waters before, during and after the event. The effect will be to restrict general navigation in the regulated area for the safety of spectators and support vessels in the event area.

DATES: 33 CFR 100.509 will be enforced from 7:30 p.m. to 9 p.m. e.d.t. on September 6, 2004.

FOR FURTHER INFORMATION CONTACT: Fernando Serrano, Marine Information Specialist, Commander, Coast Guard Group Philadelphia, 1 Washington Avenue, Philadelphia, Pennsylvania 19147, (215) 271–4944.

SUPPLEMENTARY INFORMATION: The Penn's Landing Corporation will sponsor the "Labor Day Fireworks Show" on September 6, 2004, on the Delaware River, adjacent to Penn's Landing, Philadelphia, Pennsylvania. In order to ensure the safety of participants, spectators and transiting vessels, 33 CFR 100.509 will be enforced for the duration of the event. The special local regulations will be enforced from 7:30 p.m. to 9 p.m. e.d.t. on September 6, 2004. The pyrotechnic display will be launched from 1 barge located within the regulated area. Under provisions of 33 CFR 100.509, a vessel may not enter the regulated area unless it receives permission from the Coast Guard Patrol Commander. Spectator vessels may anchor outside the regulated area but may not block a navigable channel.

In addition to this notice, the maritime community will be provided extensive advance notification via the Local Notice to Mariners, marine information broadcasts, and area newspapers, so mariners can adjust their plans accordingly.

Dated: August 3, 2004.

Sally Brice-O'Hara,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 04–18475 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–028]

RIN 1625–AA09

Drawbridge Operation Regulation; Terrebonne Bayou, Houma, LA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the existing drawbridge operation regulation for the draw of the SR 24 bridge across Terrebonne Bayou, mile 31.3, at Houma, Louisiana. The existing bridge has been modified by permit from a movable bridge to a fixed bridge. Since the bridge is no longer a movable bridge, the regulation controlling the opening and closing of the bridge is no longer necessary.

DATES: This rule is effective August 12, 2004.

ADDRESSES: Documents referred to in this rule are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, 500 Poydras Street, New Orleans, Louisiana 70130–3310, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Eighth District Bridge Administration Branch maintains the public docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, at (504) 589–2965.

SUPPLEMENTARY INFORMATION:

Good Cause for Not Publishing an NPRM

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds good cause exists for not publishing an NPRM. Public comment is not necessary since the bridge that the regulation governed has been modified from a movable bridge to a fixed and does not open for the passage of vessels.

Good Cause for Making Rule Effective in Less Than 30 Days

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register** because this rule removed the regulation used for the operation of a movable bridge that has been modified to become a fixed bridge. The modification has already taken place and the removal of the regulation will not affect mariners.

Background and Purpose

In 1977, LDOTD requested a change to the operating regulations for the SR 24 vertical lift bridge. The request was to change the regulations on the bridge that the bridge need not open for the passage of vessels due to infrequent openings. The basis of the change is that between 1966 and 1977, the bridge only opened four times. The request for change was published in the **Federal Register** and by Public Notice. On January 1, 1978, the regulation regarding the bridge was approved so that the bridge need not open for the passage of vessels.

In 1982, LDOTD issued a work order to remove the counterweights, all of the overhead structural steel and the operator's house without prior notification to the Coast Guard. This type of modification to the approved permit plans requires a Coast Guard bridge permit amendment. However, as a permit was not requested prior to the modification to the bridge, a permit amendment to change the bridge to a fixed bridge was applied for and granted after the fact. Since the bridge has been modified to a fixed bridge, a special operation regulation for a movable bridge is unnecessary.

This final rule removes the regulation regarding the SR 24 bridge.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

A special operating regulation exists for movable bridges and as this bridge has been modified to a fixed bridge, the regulation is unnecessary. We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will have no impact on any small entities. No small entities in the area have been affect by the modification of the bridge from a movable bridge to a fixed bridge.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in the preamble.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not cause an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation. Paragraph (32)(e) excludes the promulgation of operating regulations or procedures for drawbridges from the environmental documentation requirements of NEPA.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons set out in the preamble, the Coast Guard is amending Part 117 of Title 33, Code of Federal Regulations as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

§ 117.505 [Amended]

■ 2. In § 117.505, paragraph (b) is removed and paragraphs (c) and (d) and (e) are redesignated as (b) and (c) and (d).

Dated: July 28, 2004.

R.F. Duncan,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 04–18487 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05–04–148]

RIN 1625–AA87

Security Zone; Potomac River, Washington, DC and Arlington and Fairfax Counties, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone for all waters of the Potomac River, from the Woodrow Wilson Memorial Bridge upstream to the Francis Scott Key Bridge, including the water of the Anacostia River downstream from the Highway 50 Bridge to the confluence of the Potomac River. This security zone is needed to protect vessels, waterfront

facilities, the public, and other surrounding areas from destruction, loss, or injury caused by sabotage, subversive acts, accidents, or other actions of a similar nature performed by individuals or groups reacting to current world events. All vessels engaged in commercial service are prohibited from entering this security zone unless authorized by the Captain of the Port or designated representative.

DATES: This rule is effective from 8 a.m. EDT August 3, 2004, through 8 a.m. EDT November 30, 2004.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of docket [CGD05–04–148] and are available for inspection or copying at Commander, Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, MD 21226–1791 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Houck, Waterways Management Branch, at Commander, Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, MD 21226–1791, telephone number (410) 576–2674.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation under 5 U.S.C. 553 (b)(B). The Coast Guard finds that good cause exists for not publishing an NPRM. The Coast Guard operates under a three-tiered system of Maritime Security (MARSEC) conditions that are aligned with the color-coded Homeland Security Advisory System Conditions (HSAS). The Department of Homeland Security has recently raised the HSAS to color Orange based in part on threats to specific targets within the Washington D. C. metro area and, as a result, portions of the surrounding maritime environment has been elevated to the second highest level of alert, MARSEC II. Vessel control measures for the Coast Guard to establish heightened deterrence and detection of terrorist activities in the port are necessary.

Additionally, the Maritime Administration recently issued MARAD Advisory 03–06 (221500ZDEC 03) informing operators of maritime interests of increased threat possibilities to vessels and facilities and a higher risk of terrorist attack to the transportation community in the United States. Further, the heightened security posture of the country and U.S. maritime interests, described below, continues. The publication of an NPRM is contrary to the public interest insofar as urgent action is required to address the ongoing threat to U.S. maritime transportation interests.

For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The measures contemplated by the rule are intended to prevent waterborne acts of sabotage or terrorism, which terrorists have demonstrated a capability to carry out. Immediate action is needed to defend against and deter these terrorist acts. Any delay in the effective date of this rule is impracticable and contrary to the public interest.

Background and Purpose

The U.S. Maritime Administration (MARAD) in Advisory 02–07 advised U.S. shipping interests to maintain a heightened state of alert against possible terrorist attacks. MARAD more recently issued Advisory 03–06 informing operators of maritime interests of increased threat possibilities to vessels and facilities and a higher risk of terrorist attack to the transportation community in the United States. The ongoing hostilities in Afghanistan and Iraq have made it prudent for U.S. ports and waterways to be on a higher state of alert because the al Qaeda organization and other similar organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

Due to increased awareness that future terrorist attacks are possible, the Coast Guard, as lead federal agency for maritime homeland security, has determined that the Captain of the Port Baltimore must have the means to be aware of, deter, detect, intercept, and respond to asymmetric threats, acts of aggression, and attacks by terrorists on the American homeland while still maintaining our freedoms and sustaining the flow of commerce. This security zone is part of a comprehensive port security regime designed to safeguard human life, vessels, and waterfront facilities against sabotage or terrorist attacks.

The Captain of the Port Baltimore is establishing a temporary security zone for all waters of the Potomac River, from the Woodrow Wilson Memorial Bridge upstream to the Francis Scott Key Bridge, including the water of the Anacostia River downstream from the Highway 50 Bridge to the confluence of the Potomac River.

All vessels engaged in commercial service are prohibited from entering, moving within, or remaining in this security zone unless authorized by the COTP Baltimore or designated representative. Vessels engaged in commercial service desiring to enter the security zone may request COTP authorization to enter the security zone by contacting the COTP Baltimore or COTP representative by telephone at (202) 767–1194, or U.S. Coast Guard Station Washington, DC on VHF–FM channels 16 or 23A. To allow adequate time to review each request, we recommend that these vessels contact the COTP Activities Baltimore or designated representative prior to the desired entry into the security zone.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

Although this rule restricts the access of vessels engaged in commercial service within the regulated area, the effect of this rule will not be significant because: (i) The COTP Activities Baltimore may authorize access to the security zone on a case by case basis; (ii) the security zone will be in effect for a limited duration; and (iii) the Coast Guard will make notifications via maritime advisories so vessels engaged in commercial service can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: the owners or operators of vessels engaged in commercial service intending to transit the waters of the Potomac River, from the Woodrow Wilson Memorial Bridge upstream to the Francis Scott Key Bridge, including the water of the Anacostia River

downstream from the Highway 50 Bridge to the confluence of the Potomac River from 8 a.m. EDT August 3, 2004, through 8 a.m. EDT November 30, 2004. This rule will not have a significant economic impact on a substantial number of small entities for the reasons enumerated under the Regulatory Evaluation above.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or government jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that Order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1 paragraph (34)(g), of the instruction, from further environmental documentation because this rule is not expected to result in any significant environmental impact as described in NEPA. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" will be available where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295; 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. From 8 a.m. EDT August 3, 2004, through 8 a.m. EDT November 30, 2004, add temporary § 165.T05–148 to read as follows:

§ 165.T05–148 Security Zone; Potomac River, Washington, DC and Arlington and Fairfax Counties, VA.

(a) *Location.* The following area is a security zone: All waters of the Potomac

River, from the Woodrow Wilson Memorial Bridge upstream to the Francis Scott Key Bridge, including the water of the Anacostia River downstream from the Highway 50 Bridge to the confluence of the Potomac River, extending the entire width of the river.

(b) *Definitions.* (1) For the purposes of this section, *Captain of the Port* means the Commander, U.S. Coast Guard Activities Baltimore, and any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Commander, U.S. Coast Guard Activities Baltimore to act as a designated representative on his or her behalf.

(2) *Commercial service* includes any type of trade or business involving the carriage of goods or persons for hire, except services performed by a vessel on U.S. government service.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.33 apply to all persons and vessels in the security zone, or approaching the security zone.

(2) All persons and vessels in the security zone, or approaching the security zone, shall comply with the instructions of the Captain of the Port. Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(3) All vessels engaged in commercial service are prohibited from entering this security zone unless authorized by the Captain of the Port or his or her designated representative. Vessels engaged in commercial service seeking authorization to enter the security zone should contact the Captain of the Port or designated representative by telephone at 202–767–1194, or U.S. Coast Guard Station Washington, DC on VHF channels 16 or 23A.

Dated: August 3, 2004.

Curtis A. Springer,

Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.

[FR Doc. 04–18473 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05–04–151]

RIN 1625–AA87

Security Zone; Potomac River, Washington, DC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone for all waters of the Georgetown Channel, Potomac River, from the Long Railroad Bridge upstream to the Francis Scott Key Bridge. This security zone is needed to protect vessels, waterfront facilities, the public, and other surrounding areas from destruction, loss, or injury caused by sabotage, subversive acts, accidents, or other actions of a similar nature performed by individuals or groups reacting to current world events. All vessels are prohibited from entering this security zone unless authorized by the Captain of the Port or designated representative.

DATES: This rule is effective from 8 a.m. e.d.t. August 3, 2004, through 8 a.m. e.d.t. November 30, 2004.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of docket (CGD05–04–151) and are available for inspection or copying at Commander, Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, MD 21226–1791 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Houck, Waterways Management Branch, at Commander, Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, MD 21226–1791, telephone number (410) 576–2674.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation under 5 U.S.C. 553(b)(B). The Coast Guard finds that good cause exists for not publishing an NPRM. The Coast Guard operates under a three-tiered system of Maritime Security (MARSEC) conditions that are aligned with the color-coded Homeland Security Advisory System Conditions (HSAS). The Department of Homeland Security has recently raised the HSAS to color Orange based in part on threats to specific targets within the Washington, DC metro area and, as a result, portions of the surrounding maritime environment has been elevated to the second highest level of alert, MARSEC II. Vessel control measures for the Coast Guard to establish heightened deterrence and detection of terrorist activities in the port are necessary.

Additionally, the Maritime Administration recently issued MARAD Advisory 03–06 (221500ZDEC 03) informing operators of maritime interests of increased threat possibilities to vessels and facilities and a higher risk of terrorist attack to the transportation community in the United States. Further, the heightened security posture of the country and U.S. maritime interests, described below, continues. The publication of an NPRM is contrary to the public interest insofar as urgent action is required to address the ongoing threat to U.S. maritime transportation interests.

For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The measures contemplated by the rule are intended to prevent waterborne acts of sabotage or terrorism, which terrorists have demonstrated a capability to carry out. Immediate action is needed to defend against and deter these terrorist acts. Any delay in the effective date of this rule is impracticable and contrary to the public interest.

Background and Purpose

The U.S. Maritime Administration (MARAD) in Advisory 02–07 advised U.S. shipping interests to maintain a heightened state of alert against possible terrorist attacks. MARAD more recently issued Advisory 03–06 informing operators of maritime interests of increased threat possibilities to vessels and facilities and a higher risk of terrorist attack to the transportation community in the United States. The ongoing hostilities in Afghanistan and Iraq have made it prudent for U.S. ports and waterways to be on a higher state of alert because the al Qaeda organization and other similar organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

Due to increased awareness that future terrorist attacks are possible, the Coast Guard, as lead federal agency for maritime homeland security, has determined that the Captain of the Port Activities Baltimore must have the means to be aware of, deter, detect, intercept, and respond to asymmetric threats, acts of aggression, and attacks

by terrorists on the American homeland while still maintaining our freedoms and sustaining the flow of commerce. This security zone is part of a comprehensive port security regime designed to safeguard human life, vessels, and waterfront facilities against sabotage or terrorist attacks.

The Captain of the Port of Baltimore is establishing a temporary security zone for all waters of the Georgetown Channel, Potomac River, from the Long Railroad Bridge upstream to the Francis Scott Key Bridge.

Vessels are allowed to enter, move within, or remain in this security zone only with the authorization of the COTP Baltimore or designated representative.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

Although this rule restricts the access of vessels to the regulated area, the effect of this rule will not be significant because: (i) The COTP Baltimore may authorize access to the security zone on a case by case basis; (ii) the security zone will be in effect for a limited duration; and (iii) the Coast Guard will make notifications via maritime advisories so vessels can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit the waters of the Georgetown Channel, Potomac River, from the Long Railroad Bridge upstream to the Francis Scott Key Bridge from 8 a.m. e.d.t. August 3, 2004, through 8 a.m. e.d.t. November 30, 2004. This rule will not have a significant economic impact on a substantial number of small entities for the reasons enumerated under the Regulatory Evaluation above.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or government jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888-REG-FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that Order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these

standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1 paragraph (34)(g), of the instruction, from further environmental documentation because this rule is not expected to result in any significant environmental impact as described in NEPA. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" will be available where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295; 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. From 8 a.m. e.d.t. August 3, 2004 through 8 a.m. e.d.t. November 30, 2004, add temporary § 165.T05–151 to read as follows:

§ 165.T05–151 Security Zone; Potomac River, Washington, D.C.

(a) *Location.* The following area is a security zone: All waters of the Georgetown Channel, Potomac River, from the Long Railroad Bridge upstream to the Francis Scott Key Bridge.

(b) *Definitions.* For the purposes of this section, Captain of the Port means the Commander, U.S. Coast Guard Activities Baltimore, and any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Commander, U.S. Coast Guard Activities Baltimore to act as a designated representative on his or her behalf.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.33 apply to all persons and vessels in the security zone, or approaching the security zone.

(2) All persons and vessels in the security zone, or approaching the security zone, shall comply with the instructions of the Captain of the Port. Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. Vessels are allowed to enter, move within, or remain in this security zone only with the authorization of the Captain of the Port or designated representative.

Dated: August 3, 2004.

Curtis A. Springer,

Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.

[FR Doc. 04–18482 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–2394; MB Docket No. 02–76; RM–10405, 10499]

Radio Broadcasting Services; Belle Haven, VA, Crisfield, MD, Exmore, Nassawadox, and Poquoson, VA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a petition for reconsideration of a *Report and Order*, 68 FR 59748 (October 17, 2003), this *Memorandum Opinion and Order* substitutes Channel 250A for Channel 245A at Crisfield, Maryland, and substitutes Channel 252A for Channel 250B1 at Belle Haven, Virginia. The coordinates for Channel 250A at Crisfield, Maryland are 37–54–51 NL and 75–42–45 WL, with a site restriction of 14.63 kilometers (9.1 miles) southeast of Crisfield. The coordinates for Channel 252A at Belle Haven, Virginia, are 37–33–14 NL and 75–49–14 WL, with a site restriction of 0.04 kilometers (0.02 miles) southeast of Belle Haven, Virginia.

DATES: Effective September 13, 2004.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order*, MB Docket No. 02–76, adopted July 28, 2004, and released July 30, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC, 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202 863–2893, facsimile 202 863–2898. The Commission will send a copy of this *Memorandum Opinion and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 reads as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Maryland, is amended by adding Channel 250A and by removing Channel 245A at Crisfield.

■ 3. Section 73.202(b), the Table of FM allotments under Virginia, is amended by adding Channel 252A and by removing Channel 250B1 at Belle Haven.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–18465 Filed 8–11–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 573 and 577

[Docket No. NHTSA 2001–11107; Notice 3]

RIN 2127–AJ05

Motor Vehicle Safety; Reimbursement Prior to Recall

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Response to a petition for reconsideration.

SUMMARY: This document denies a petition for reconsideration of a final rule issued by NHTSA with respect to the reimbursement of costs incurred by owners of motor vehicles or motor vehicle equipment to remedy of safety-related defects or noncompliances with a Federal motor vehicle safety standard (FMVSS). That final rule implemented section 6(b) of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act. Under the rule, in their programs to remedy defects or noncompliances, motor vehicle and motor vehicle equipment manufacturers are required to include a plan for reimbursing owners for the cost of a remedy incurred within specified times before and shortly after the manufacturer's notification of the defect or noncompliance.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, contact George Person, Office of Defects Investigation, NHTSA (phone: 202–366–5210). For legal issues, contact Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202–366–5263).

SUPPLEMENTARY INFORMATION:

I. Background

Section 6(b) of the TREAD Act amended 49 U.S.C. 30120(d) to require a manufacturer's remedy program to include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification under 49 U.S.C. 30118 (b) or (c). Section 6(b) further authorized the Secretary to prescribe regulations establishing what constitutes a reasonable time and other reasonable conditions for the reimbursement plan. *See* 49 U.S.C. 30120(d).

On October 17, 2002, NHTSA published a final rule implementing the reimbursement provision of the TREAD Act. 67 FR 64049. The final rule required manufacturers' programs for remedying safety defects and noncompliances in motor vehicles and equipment to include reimbursement plans that, at a minimum, cover certain expenditures incurred to remedy the defect or noncompliance before the implementation of the recall. *See* 49 CFR 573.13 and 577.11 (2003). The reader is referred to that notice, and the prior Notice of Proposed Rulemaking (NPRM), 66 FR 64078 (December 11, 2001), for further information.

The rule requires manufacturers to provide reimbursement, at a minimum, to consumers who obtain a pre-notification remedy within a specified time period. The beginning of the minimum reimbursement period is determined by first considering the underlying categorical basis for the recall. For recalls based upon a safety-related defect, the start of the minimum reimbursement period is the date NHTSA's Office of Defects Investigation (ODI) opens an investigation known as an engineering analysis (EA) or one year prior to the date the manufacturer submits its notice of a defect to NHTSA pursuant to 49 U.S.C. 30118(b) or (c) and 49 CFR Part 573, whichever is earlier. For recalls based upon a noncompliance with a FMVSS, the start of the minimum reimbursement period is the date of the observation of a test failure by either the manufacturer or NHTSA.

The end of the minimum reimbursement period is determined by the nature of the product being recalled. For motor vehicles, the end date is ten days after the date the manufacturer mailed the last of its notices to owners pursuant to 49 CFR 577.5. For replacement equipment, the end date is ten days after the date the manufacturer mailed the last of its notices pursuant to 49 CFR 577.5 or 30 days after the conclusion of the manufacturer's initial efforts to provide public notice of the existence of the defect or noncompliance pursuant to 49 CFR 577.7, whichever is later. Manufacturers may (and generally do) provide reimbursement for a longer period than required under the rule.

The agency based the regulatory delineation of "reasonable time" on the language and legislative history of section 6(b) of the TREAD Act. We also considered the free remedy provision of the National Traffic and Motor Vehicle Safety Act, as amended, 49 U.S.C. Chapter 301 (Safety Act). Under the Safety Act, manufacturers of motor vehicles and equipment that are recalled must provide a remedy without charge unless the vehicle or replacement equipment was bought by a first purchaser more than 10 calendar years (5 years for a tire) before notice of a defect or noncompliance with a FMVSS under 49 U.S.C. 30118. *See* 49 U.S.C. 30120(g)(1). As explained in the preamble to the final rule, in the TREAD Act reimbursement provision, Congress required a reimbursement period covering persons who incurred the cost of the remedy within a "reasonable time in advance" of the manufacturer's notification under section 30118.[1] We therefore concluded that the period for reimbursement should be limited by this language. 67 FR at 64051. We also noted that Congress was well aware of statutory periods for free remedies (49 U.S.C. 30120(g)(1)), since it had extended those periods in section 4 of the TREAD Act, and the fact that it did not reference it in the reimbursement provision of the Act cannot be viewed as inadvertent. *See* 67 FR at 64052. Thus, we reasoned that not all pre-notification remedies within the free remedy period were to be eligible for reimbursement.

In deciding what time period constituted a "reasonable time in advance" of a manufacturer's notification of a defect or noncompliance, we relied upon the statutory concerns underlying the remedy of noncompliances with FMVSSs and safety-related defects, and where applicable, the agency's investigative process. *See* 67 FR at 64051–53 and 66 FR at 64078–79 (December 11, 2001) (NPRM). As noted in the NPRM, we believe that the minimum period for reimbursement need not begin before consumers would be expected to have a substantial concern that the problem in question would need to be addressed by a safety recall. *See* 66 FR at 64079. As explained above, in our view, for noncompliances this would be when NHTSA or the manufacturer observes a test failure; for safety defects, it would be when ODI opens an EA or one year before the manufacturer submits its Part 573 notice, whichever is earlier. *See* 67 FR 64079. Before these dates, in our view, there would be no reason for a consumer to anticipate a safety recall would be forthcoming. While an owner of a motor vehicle or motor vehicle equipment may need to address a problem in his or her vehicle or equipment prior to these dates, and thus incur the cost of a remedy, the overall level of concern over the matter will not have reached a level such that a recall

[1] In addition to the differences in the time periods of the free remedy provision and the reimbursement provision, the provisions run from different dates. The free remedy runs from the date of the first purchase; the reimbursement period begins at a reasonable time in advance of the manufacturer's notification under 49 U.S.C. § 30118(b) or (c).

would be anticipated. Thus, under the rule, reasonable concerns would not dictate delaying the replacement or the repair of a problematic part on the basis of an expectation that with a delay a free remedy would be available under a recall, as was the case with the Firestone tires that preceded the enactment of the TREAD Act. There, as reported to NHTSA, some owners delayed replacing Firestone tires, which were under investigation and determined to be defective shortly thereafter, because they would have to pay for the replacements, but would not have to do so if there was a recall.

Public Citizen (PC) and the Center for Auto Safety (CAS) (collectively "PC/CAS") jointly filed a timely petition for reconsideration of the rule.

II. Discussion

PC/CAS's petition contends that the mandatory reimbursement period established by the final rule is too limited. PC/CAS take issue with both the beginning date and the end date of the required reimbursement period.

A. Beginning Date of the Reimbursement Period

PC/CAS object to the beginning date of the reimbursement period on various grounds. They first argue that NHTSA's regulation is inconsistent with the purpose of a reimbursement amendment offered by Congressman Bill Luther during the deliberations on the TREAD Act. More broadly, throughout their petition, they claim that the agency's determination of what constitutes a "reasonable time" is inconsistent with the overall purposes of the TREAD Act. They also assert that the rule fails to provide a "uniform" remedy and that NHTSA therefore should have adopted one of two "bright-line" rules. They also contend that the rule does not advance several of their policy choices.

Our responses follow.

1. The Luther Amendment

PC/CAS assert that the period for reimbursement in the rule is inconsistent with the purpose of a proposed amendment offered by Congressman Bill Luther to the bill that ultimately became the TREAD Act. PC/CAS argue that Congressman Luther's amendment was intended to encourage consumers to act on safety defects as soon as they are evident, rather than wait for a formal recall, and that a reimbursement period that falls short of the period for a free remedy under section 30120(g)(1)[2] is inconsistent with the amendment. PC/CAS's reliance on the Luther amendment is misplaced because they fail to recognize that Congressman Luther's amendment was modified before the bill was enacted.

The initial bills introduced in both the House of Representatives (H.R. 5164) and the Senate (S. 3059) in the wake of the Firestone tire investigation did not include any reimbursement language. Mr. Luther's amendment, offered during the mark-up of the bill in the House Subcommittee on Telecommunications, Trade, and Consumer Protection on September 21, 2000, would have required:

> a manufacturer to fully reimburse the owner of a motor vehicle which replaces equipment on a motor vehicle before a recall is ordered under subsection (a) or (b) because such equipment is defective or not in compliance with a motor vehicle safety standard.

This proposed amendment did not refer to any time limitation for the period for reimbursement.

However, the full Committee did not adopt Mr. Luther's reimbursement language. On October 6, 2000, during the mark-up conducted by the full Committee on Commerce, its Chairman, Congressman Billy Tauzin, offered an amendment to Mr. Luther's reimbursement provision. Among other changes, Chairman Tauzin's amendment, which was ultimately enacted as section 6(b) of the TREAD Act, added a time limitation to the period for reimbursement:

> A manufacturer's remedy program shall include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification under subsection (b) or (c) of section 30118. The Secretary may prescribe regulations establishing what constitutes a reasonable time for purposes of the preceding sentence and other reasonable conditions for the reimbursement plan.

The Commerce Committee reported H.R. 5164, as amended, to the House of Representatives. *See* H.R. Report No. 106–954, p. 11 (2000). The summary section of the report stated, "[F]urther, the legislation addresses * * * reimbursement for parts replaced *immediately* prior to a recall." *Id.* at p. 6 (emphasis supplied).

No further amendments to the reimbursement provision were offered in the House. The full House of Representatives passed H.R. 5164 as reported out of Committee. *See* 146 Cong. Rec. H9624–32 (2000). The Senate passed H.R. 5164 on October 11, 2000. *See* 146 Cong. Rec. S10272 (2000).[3]

2. The Purposes of the TREAD Act

PC/CAS next argue that the time periods established in the reimbursement rule are inconsistent with the purposes of the TREAD Act. PC/CAS broadly advance various purposes of the TREAD Act such as: to "incentivize" recalls and "disincentivize" stonewalls; discourage foot dragging by manufacturers by making it less financially advantageous to delay announcement of a recall; to influence customer behavior; to encourage the timely replacement of defective parts and remedy a defect before an official acknowledgement; to expand consumers' rights; to provide meaningful recourse to consumers affected by a recall; and not limit reimbursement in a manner contrary to good public policy. PC/CAS broadly assert that the agency's reimbursement rule fails to further these purposes of the TREAD Act.

PC/CAS's broad assertions of various and sundry purposes of the TREAD Act lack support or citation. Even if one could read some provisions of the TREAD Act as being consistent with some or all of these asserted "purposes," it would not support PC/CAS's arguments. Section 6(b) cannot fairly be viewed as an omnibus provision that authorized NHTSA to adopt rules to advance general policies. We must be guided by the language of the statutory provision. Thus, for example, while we agree with PC/CAS that an apparent congressional purpose of Section 6(b) was to expand consumer rights by creating an obligation on manufacturers to provide reimbursement to purchasers for some pre-recall expenditures that was not previously required under the Safety Act, that would not resolve the scope of the rule. The critical question is the *extent* of the rights, which requires consideration of the statutory term "a reasonable time in advance of notification." That is just what NHTSA did.

3. Uniform Statutory Remedy

PC/CAS further argue that the reimbursement rule does not provide a "uniform statutory remedy" because the

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[2] Section 30120(g)(1) states: "The requirement that a remedy be provided without charge does not apply if the motor vehicle or replacement equipment was bought by the first purchaser more than 10 calendar years, or the tire, including an original equipment tire, was bought by the first purchaser more than 5 calendar years, before notice is given under section 30118(c) of this title or an order is issued under section 30118(b) of this title, whichever is earlier."

[3] The reimbursement provision was inadvertently left out of H.R. 5164 as reported. On October 12, 2000, the House of Representatives passed H. Con. Res. 428 to add it. *See* 146 Cong. Rec. H9852 (2000). The Senate passed H. Con. Res. 428 on October 17, 2000. *See* 146 Cong. Rec. S10632 (2000).

reimbursement period is based upon the timing of the remedy rather than the nature of the remedy. PC/CAS contend that this can cause similarly situated consumers to be treated differently.

PC/CAS do not point to any language in Section 6(b) of the TREAD Act that supports its assertion that the reimbursement period should be based on the nature of the remedy or that all persons who remedied a defect or noncompliance prior to the manufacturer's notification must have the same right to reimbursement. By its terms, the TREAD Act's reimbursement provision is oriented toward the timing of the remedy; it expressly refers to reimbursement of a purchaser who "incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification." Accordingly, in circumstances where one vehicle was repaired before the beginning of the reimbursement period and another vehicle was repaired during the reimbursement period, the fact that the rule does not require the owner of the first vehicle to be reimbursed is entirely consistent with the statute and its legislative history.

We note that even under PC/CAS view that the reimbursement period should be based on the time for a free remedy under section 30120(g)(1), there may be differences in eligibility for reimbursement. For example, in cases where a defective part is used for several model years, under PC/CAS's preferred "bright-line" approach, owners of vehicles under 10 years old would be eligible for reimbursement, while owners of vehicles with the same defective part that are more than 10 years old would not be eligible for reimbursement.

4. Manufacturers' Reduction of Their Liability

One of PC/CAS's central themes is that by basing the time frame for the duty to reimburse on the opening of an Engineering Analysis in a defect investigation, the longer a manufacturer can ward off an EA, the lower its liability. PC/CAS thus claim that the reimbursement rule creates an incentive for manufacturers to delay a recall and stonewall the agency.

As discussed above, Section 6(b) was not framed in terms of incentives for timely recalls. Moreover, we do not agree that the reimbursement rule would encourage a manufacturer to delay a recall. There are several factors that encourage the timely determination and notification of safety-related defects and noncompliances that far outweigh any possible cost savings that might be achieved through limiting the number of owners possibly entitled to reimbursement.

The Safety Act requires manufacturers to notify NHTSA and owners of vehicles and equipment when the manufacturer learns that the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety, or decides in good faith that the vehicle or equipment does not comply with an applicable FMVSS. *See* 49 U.S.C. 30118(c)(1) and (2). Such notification must be given within a reasonable time after the manufacturer first decides that a safety-related defect or noncompliance exists under section 30118(c). *See* 49 U.S.C. 30119(c)(2). A manufacturer cannot evade its statutory obligations "by the expedient of declining * * * to reach its own conclusion as to the relationship between a defect in its vehicles and * * * safety." *United States* v. *General Motors Corp.*, 574 F. Supp. 1047, 1050 (D.D.C. 1983). Thus, a manufacturer incurs its duties to notify and remedy whether it actually determined, or it should have determined, that its vehicles are defective and the defect is safety-related. The failure to perform these duties in a timely manner is a violation of the Safety Act that can subject the manufacturer to substantial civil penalties. *See* 49 U.S.C. 30165.[4]

The TREAD Act also reduced the likelihood that NHTSA will be unaware of a potential safety problem. Prior to the TREAD Act, in deciding whether to open a defect investigation, NHTSA relied heavily on owner complaints to obtain information about potential problems. The TREAD Act significantly expanded the nature and amount of information NHTSA receives authorizing the agency to require manufacturers to submit a wide variety of information related to potential defects. *See* Sections 3(a) and 3(b) of the TREAD Act, 49 U.S.C. 30166(l) and (m). NHTSA implemented these provisions by requiring manufacturers submit Early Warning Reporting (EWR) information, reports on foreign recalls, and various advisories and bulletins. *See* 49 CFR Part 579. This information will reduce a manufacturer's ability to delay or avoid a recall in the hope that the agency will not become aware of a real-world safety problem.[5]

PC/CAS cite a handful of specific instances where manufacturers have delayed conducting recalls, such as Ford's recall of model year (MY) 1988–93 vehicles with defective ignition switches and Chrysler's recall of MY 1993–95 Chrysler LH vehicles to address fuel rail leaks. These examples do not make their case. To begin, in view of the small numbers, they are not representative. Vehicle manufacturers undertake hundreds of recalls per year. In 2003, vehicle manufacturers conducted 529 vehicle recalls; the average number of recalls per year for the last five years is 471. In 2003, approximately 75 percent (or 401) were undertaken by manufacturers in the absence of investigations by NHTSA.

Second, PC/CAS have not demonstrated that a desire on the part of manufacturers to limit reimbursing owners was a factor, much less a significant factor, in delaying the cited recalls. Ordinarily, a recall is triggered if only a small fraction of vehicles exhibit a defect. *See, United States* v. *General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975) (*Wheels*) (holding that a wheel is defective if there were a significant number of failures and noting that the term "significant" indicates that there must be a non-*de minimus* number of failures. 518 F.2d at 438 fn. 84.) The significant cost in a recall campaign is the cost of remedying the vehicles that have been recalled. In comparison, the cost of reimbursing owners of the small fraction of vehicles that have been repaired before the recall is not particularly significant. Thus, while it is possible that a manufacturer would improperly delay a recall, it is highly unlikely that such a decision would be driven by anticipated reimbursement costs. In addition, once they decide to conduct a recall, many manufacturers provide broad reimbursement, in part as a matter of customer relations. In fact, in both the Ford ignition switch and Chrysler fuel rail recalls, Ford and Chrysler offered reimbursement to all consumers who had remedied the problems prior to the announcement of the recall, regardless of the length of time involved.[6] The fact

[4] Section 5(a) of the TREAD Act significantly increased the potential amount of such civil penalties from $1,000 to $5,000 per violation and increased the maximum civil penalty for a related series of violations from $925,000 to $15,000,000.

[5] For example, EWR information recently helped lead to the early identification of a safety problem in, and the recall of, certain tires manufactured by Bridgestone/Firestone, Inc. *See* Danny Hakim, *Another Recall Involving Ford, Firestone Tires and SUVs*, N.Y. Times, February 27, 2004, at C1. In the same article, Joan Claybrook, President of Public Citizen, one of the petitioners here, said the action showed that the new system worked. *Id.* at C5.

[6] Ford's notification letters to owners advising of a defect in the ignition switch provided that Ford would provide a refund if the owner obtained the remedy before the date of the owner notification letter. Chrysler also offered reimbursement to owners who remedied the fuel rail leaks prior to recall. *See Carson* v. *DaimlerChrysler Corp.*, No. W2001–03088, 2003 WL 1618076 (Tenn. Ct. App. March 19, 2003).

that Ford and Chrysler provided reimbursement without any time limitation (and provided it before the statutory requirement to do so) further demonstrates that a desire to reduce the cost of potential reimbursements is not a factor that would cause manufacturers to improperly delay defect or noncompliance determinations.

5. Other Concerns

PC/CAS contend that as a result of its tying "reasonable time" to the agency's investigative processes, the reimbursement rule is unnecessarily complex and consumers will be unaware of the reference point for the reimbursement period. As we stated in the preamble to the final rule, we find it unnecessary for consumers to know how "reasonable time" is determined or have an intimate knowledge of NHTSA's investigative process. *See* 67 FR at 64052. Under the rule, manufacturers must provide the specific dates for the period of reimbursement in their reimbursement plans and provide appropriate notice to consumers. *See* 49 CFR 577.11(d)(3).

PC/CAS raise a narrow issue involving the start of the reimbursement period when the recall was based on a noncompliance with a FMVSS. They assert that tying reimbursement to the "'date of the [manufacturer's] initial test failure or the initial observation of a possible noncompliance' confers upon manufacturers virtually unrestricted leeway to define a reimbursement period, latitude that would likely be advantageous to manufacturers at the expense of consumers."

As explained in the preamble to the NPRM, the observation of a possible noncompliance through testing or observation is a critical point in the initiation of a recall because, while not determinative of a noncompliance, it is the triggering event for OVSC or a manufacturer to conduct an investigation into the potential noncompliance. *See* 66 FR at 64078–64079; *see also* 67 FR at 64051–64052. Thus, we based the start of the reimbursement period for recalls related to noncompliances with a FMVSS on the date of the observation of an apparent failure. Before that time, consumers will have no reason to believe that a noncompliance exists, and will be unlikely to seek a remedy based on a concern about safety.

We also disagree that this provision will allow manufacturers to manipulate the reimbursement period. The date of the initial observation of a possible noncompliance is identified by the manufacturer in its Part 573 report to the agency (*see* 49 CFR 573.6(c)(7)) and is objectively determinable.

PC/CAS also argue that the agency could have adopted one of two bright-line rules to determine "reasonable time" in the rulemaking. PC/CAS first suggest a bright line derived from consumer law, *i.e.*, one based on the discovery rule. According to PC/CAS, the applicable period of time to seek recovery would run from the date the consumer discovers the defect recall remedy, which is the date of the receipt of the manufacturer's recall notice, and would continue until barred by a state law statute of limitations.

PC/CAS's petition itself reveals a basic flaw in its discovery rule approach, which renders it irrelevant. It states that it is based on consumer law; it does not purport to be based on Section 6(b) of the TREAD Act. The discovery rule approach is not in accord with the Act, because it does not provide for reimbursement of an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification. It provides for reimbursement of costs incurred within an unlimited time before a manufacturer's notification. Also, this approach, which depends on state laws, which may differ or may not exist, does not produce a bright line.

The second, and better approach according to PC/CAS, is to adopt the 10-year/5-year time frame for a free repair provided by section 30120(g)(1) as the reasonable time frame for reimbursement. As discussed above, this is neither required by, nor consistent with, Section 6(b).

End Date for Reimbursement

PC/CAS also seek reconsideration of the end dates for the reimbursement period established in the final rule. This is apparently based on a misunderstanding of the rule.

The end date for the reimbursement period is the last date on which a consumer may incur costs that are eligible for reimbursement. We established such a date because Section 6(b) is designed to assure coverage of the reimbursement of remedy costs that are incurred in advance of the manufacturer's notification. Once a consumer receives a recall notice, any subsequent remedial action should be in accordance with the terms of the recall.[7]

PC/CAS seem to believe that the end date in the rule limits the period during which consumers may submit a claim for reimbursement for the costs of a pre-notification remedy. In fact, manufacturers are not allowed to establish a cut-off date for the submission of reimbursement claims. While in the NPRM we originally proposed to allow manufacturers to establish a cut-off date (*see* 66 FR at 64083), for reasons explained in the preamble to the final rule, we decided not to do so (*see* 67 FR at 64059).

Therefore, based upon the above, we are denying PC/CAS's petition for reconsideration of the reimbursement rule.

III. Rulemaking Analyses

NHTSA set forth its rulemaking analyses in the preamble to the final rule. This supplements those statements. Under the Paperwork Reduction Act of 1995, and OMB's regulation at 5 CFR 1320.5(b)(2), on June 9, 2004, NHTSA received approval from OMB for an amendment to a previously-approved information collection requirement (OMB control number 2127–0004) that includes the reimbursement rule.

Issued on: August 9, 2004.

Jeffrey W. Runge,

Administrator.

[FR Doc. 04–18485 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–59–P

[7] Pursuant to 49 U.S.C. 30120, the manufacturer initially determines the type of remedy available to the consumer after notification of a noncompliance or safety defect.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 579

[Docket No. NHTSA 2001–8677; Notice 11]

RIN 2127–AI25

Reporting of Information and Documents About Potential Defects; Correction

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the final early warning reporting rule, which initially was published on July 10, 2002 (67 FR 45822).

DATES: This final rule is effective August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Jonathan White, Office of Defects Investigation, NHTSA (phone: 202–366–5226).

SUPPLEMENTARY INFORMATION: On July 10, 2002, NHTSA published a final rule

implementing the early warning reporting (EWR) provisions of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, 49 U.S.C. 30166(m) (67 FR 45822). At the same time, we reorganized 49 CFR part 573. As a result of that reorganization, 49 CFR 573.5 was renumbered as 49 CFR 573.6.

One section of the EWR regulations, 49 CFR 579.5(a), currently references 49 CFR 573.5(c)(9). In view of the reorganization of part 573, this reference was incorrect. The correct reference is 49 CFR 573.6(c)(9) because, as noted above, section 573.5 was renumbered as section 573.6 in 2002.

Today's amendment corrects this error.

List of Subjects in 49 CFR Part 579

Imports, Motor vehicle safety, Motor vehicles, Reporting and recordkeeping requirements.

■ Accordingly, 49 CFR part 579 is corrected by making the following correcting amendment.

PART 579—REPORTING OF INFORMATION AND COMMUNICATIONS ABOUT POTENTIAL DEFECTS

■ 1. The authority citation for part 579 continues to read as follows:

Authority: Sec. 3, Pub. L. 106–414, 114 Stat. 1800 (49 U.S.C. 30102–103, 30112, 30117–121, 30166–167); delegation of authority at 49 CFR 1.50.

Subpart A—General

■ 2. Revise paragraph (a) of § 579.5 to read as follows:

§ 579.5 Notices, bulletins, customer satisfaction campaigns, consumer advisories, and other communications.

(a) Each manufacturer shall furnish to NHTSA a copy of all notices, bulletins, and other communications (including those transmitted by computer, telefax, or other electronic means and including warranty and policy extension communiques and product improvement bulletins) other than those required to be submitted pursuant to § 573.6(c)(9) of this chapter, sent to more than one manufacturer, distributor, dealer, lessor, lessee, owner, or purchaser, in the United States, regarding any defect in its vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in use, or any failure of performance, or any flaw or unintended deviation from design specifications), whether or not such defect is safety-related.

* * * * *

Issued on: August 6, 2004.

Kenneth N. Weinstein,

Associate Administrator for Enforcement.

[FR Doc. 04–18353 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–59–P

Proposed Rules

Federal Register
Vol. 69, No. 155
Thursday, August 12, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 304

[Docket No. 02–086–1]

RIN 0579–AB54

Methyl Bromide; Official Quarantine Uses

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to establish regulations to provide for the submission of requests by State, local, or tribal authorities for a determination whether methyl bromide treatments or applications required by the State, local, or tribal authorities to prevent the introduction, establishment, or spread of plant pests or noxious weeds should be authorized as official quarantine uses. These proposed regulations are necessary to comply with a recent amendment to the Plant Protection Act that requires the Secretary to publish and maintain a registry of authorized State, local, and tribal requirements for methyl bromide treatments or applications. This proposed rule would establish a process by which State, local, or tribal authorities could request and, if warranted, receive, a determination that their methyl bromide requirements should be authorized as official quarantine uses.

DATES: We will consider all comments that we receive on or before October 12, 2004.

ADDRESSES: You may submit comments by any of the following methods:

- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. 02–086–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 02–086–1.
- *E-mail:* Address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 02–086–1" on the subject line.
- *Agency Web Site:* Go to *http://www.aphis.usda.gov/ppd/rad/cominst.html* for a form you can use to submit an e-mail comment through the APHIS Web site.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

FOR FURTHER INFORMATION CONTACT: Dr. Inder P. Gadh, Treatment Specialist, Phytosanitary Issues Management, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737; (301) 734–6799.

SUPPLEMENTARY INFORMATION:

Background

Methyl bromide is a broad-spectrum pesticide used as a fumigant to control insect pests, nematodes, weeds, and pathogens. Its primary uses are for soil fumigation, post-harvest protection, and quarantine treatments.

In the United States, production, consumption, and trade of methyl bromide are regulated by the Environmental Protection Agency (EPA) under the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*). The Clean Air Act provides the basic framework to regulate air quality through air pollution control, and it has been amended to reflect changes in U.S. obligations under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol). EPA also regulates methyl bromide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*).

The United States is a Party to the Montreal Protocol, an international treaty that provides a schedule to reduce and eventually eliminate the emissions of various manmade, ozone-depleting substances, including methyl bromide. The Montreal Protocol requires a phaseout of methyl bromide production and consumption in developed countries, including the United States, by the year 2005 and in developing countries by the year 2015. However, the Montreal Protocol exempts quarantine and pre-shipment (QPS) applications of methyl bromide from these phaseout requirements.

The Farm Security and Rural Investment Act of 2002 amended the Plant Protection Act (PPA) by adding a new sec. 419 (7 U.S.C. 7719) that pertains specifically to methyl bromide. Among other things, the amendment requires the Secretary of Agriculture, upon request of State, local, or tribal authorities, to determine whether a methyl bromide treatment or application required by those authorities to prevent the introduction, establishment, or spread of plant pests (including diseases) or noxious weeds should be authorized as an official control or official requirement. The Secretary may not make such a determination unless she finds that there is no other registered, effective, and economically feasible alternative available. The amendment also directs the Secretary to publish and maintain a registry of those State, local, and tribal requirements for methyl bromide treatments and applications that she has determined should be authorized as an official control or official requirement.

We are proposing to establish regulations to comply with the requirements of this amendment to the PPA. Specifically, we are proposing to add a new part 304 to our regulations in title 7 of the Code of Federal Regulations that would establish procedures that State, local, and tribal authorities would have to follow when submitting a request to the Administrator of the Animal and Plant Health Inspection Service (APHIS), acting on behalf of the Secretary of Agriculture, to have a required methyl

bromide application or treatment recognized as an official control or official requirement. The proposed regulations also describe the criteria that the Administrator would use to evaluate such requests.

Definitions

Section 304.1 of the proposed regulations includes three standard definitions that are consistent with those used elsewhere in our regulations. We would define *Administrator* as the Administrator of the Animal and Plant Health Inspection Service or any individual authorized to act for the Administrator; *Animal and Plant Health Inspection Service (APHIS)* as the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture (USDA); and *State* as any of the several States of the United States, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States. The section would also include definitions of *control* and *requirement*. *Control* would be defined as "suppression, containment, or eradication of a pest population," which is the same definition found in the International Plant Protection Convention's Glossary of Phytosanitary Terms. *Requirement* would be defined as "a treatment or application to prevent the introduction, establishment or spread of pests." This proposed definition is drawn from the common EPA and Montreal Protocol definition of the term "quarantine applications."

Proposed § 304.1 also includes a definition of *official quarantine use*, under which the terms "official control" and "official requirement" would be subsumed. We believe that defining and using the single term *official quarantine use* would aid officials of State, local, and tribal authorities by succinctly characterizing the type of methyl bromide application or treatment for quarantine purposes that would qualify as an official control or official requirement.

We would define *official quarantine use* in § 304.1 as: "A methyl bromide treatment or application that the Administrator determines to be an official control or official requirement, based on information that the treatment or application is required by a State, local, or tribal authority for either of the following reasons: (1) For the management of plant pests or noxious weeds of potential importance to the area endangered thereby and not yet present there, or present but not widely distributed; or (2) to meet official quarantine requirements for the management of economic plant pests in plant material intended for propagation."

In contrast, in its January 3, 2003, final rule titled "Protection of Stratospheric Ozone: Process for Exempting Quarantine and Preshipment Applications of Methyl Bromide" (68 FR 237–254), under authority of section 604(d)(5) of the Clean Air Act, the EPA defined the term *quarantine applications*, in part, as "treatments to prevent the introduction, establishment and/or spread of quarantine pests (including diseases), or to ensure their official control, where: (1) Official control is that performed by, or authorized by, a national (including state, tribal or local) plant, animal or environmental protection or health authority; (2) quarantine pests are pests of potential importance to the areas endangered thereby and not yet present there, or present but not widely distributed and being officially controlled. This definition excludes treatments of commodities not entering or leaving the United States or any State (or political subdivision thereof)." With the exception of the last sentence, this definition tracked the definition of "quarantine application" with respect to methyl bromide agreed among parties to the Montreal Protocol, including the United States, in 1995 (Decisions VII/5).

There are differences between our proposed definition of *official quarantine use* and EPA's definition of *quarantine applications* because we believe that it is important for our definition to explicitly provide for those instances where the treatment of plant material intended for propagation may be required by a particular State, local, or tribal authority for quarantine purposes. We welcome any suggestions or specific comments regarding our proposed definition of *official quarantine use*.

As noted earlier in this document, the EPA, under the authority of the Clean Air Act, regulates the production, consumption, and trade of methyl bromide in the United States. It should also be noted that paragraph (d)(2) of the new sec. 419 of the PPA provides that "[n]othing in this section shall be construed to alter or modify the authority of the Administrator of the Environmental Protection Agency or to provide any authority to the Secretary of Agriculture under the Clean Air Act or regulations promulgated under the Clean Air Act." We wish to make it clear that in issuing this proposed rule, our intent is to fulfill our responsibilities under sec. 419, not to establish a parallel or alternative regulatory mechanism governing the consumption of methyl bromide. As we note in proposed § 304.2(e), the Administrator of the Environmental Protection Agency will continue to exempt, consistent with the Montreal Protocol and under the authority of the Clean Air Act, quarantine applications of methyl bromide. In addition, the proposed regulations are not intended to have any effect on requirements issued by EPA under FIFRA.

Requests for Determination; Review of Determinations

Section 304.2 of the proposed regulations, "Requests for determination," contains general provisions pertaining to requests for authorization of methyl bromide uses as official quarantine uses, criteria that the Administrator would use in evaluating such requests, and a description of the process by which a previously authorized official quarantine use may be removed from the registry when appropriate.

Paragraph (a) would indicate that a State, local, or tribal authority may request that the Administrator determine whether a methyl bromide treatment or application required by the State, local, or tribal authority should be authorized as an official quarantine use. Paragraph (b) would provide that the Administrator will make a determination in response to a request not later than 90 days after its receipt. The Administrator would issue a favorable determination if the methyl bromide treatment or application under consideration conformed to the definition of *official quarantine use* in § 304.1 and if he or she found that no other registered, effective, and economically feasible alternative to methyl bromide existed for that treatment or application. This paragraph would also provide that if the Administrator determined that a methyl bromide treatment or application should not be authorized as an official quarantine use, the Administrator would provide to the requestor, in writing, the reasons for his or her determination.

Given that the terms "registered, effective, and economically feasible" are not defined in sec. 419, we expect that these terms, as they would apply to the consideration of requests, would have their commonly understood meanings, *i.e.*:

- "Registered" means a pesticide registered or otherwise approved by EPA for a specific use;
- "Effective" means that there is a body of science with sufficient rigor and

specificity to show that an alternative treatment would meet the efficacy requirements to allow its consideration as a quarantine treatment; and

• "Economically feasible" means that the costs of the alternative quarantine treatment would not be so high as to make the trade in the treated good prohibitively expensive.

We welcome any suggestions or specific comments regarding our interpretation of these criteria, particularly with respect to factors that you believe could or should be taken into account while considering the economic feasibility of a potential alternative to methyl bromide.

While the proposed regulations themselves do not address research, we wish to note that the Administrator's determination that a particular treatment or application should be authorized as an official quarantine use has the effect of spurring further research into alternatives to that treatment or application. Specifically, paragraph (b) of sec. 419 provides, in part, that "[f]or uses where no registered, effective, economically feasible alternatives available can currently be identified, the Secretary shall initiate research programs to develop alternative methods of control and treatment." Ongoing USDA research activities led by the Agricultural Research Service are investigating alternatives for major uses of methyl bromide. The research requirements of sec. 419 may influence the allocation of research resources, to the extent that it provides specific statutory justification for research on alternatives to methyl bromide used for quarantine purposes, and may influence the areas of emphasis within the array of federally funded research programs on alternatives. State, local, or tribal authorities may value federally mandated efforts to develop registered, effective and economically feasible alternatives to quarantine uses of methyl bromide. This interest could be expected to strengthen as the cost of methyl bromide use increases.

Proposed paragraph (c) provides for the review of authorized uses. As proposed, a review would be triggered by the registration by EPA of a new pesticide, or a new use for an existing pesticide, that could serve as an alternative to the treatment or application authorized as an official quarantine use. We believe that registration is a logical trigger for such a review, given that it would serve as an indication of the likely availability of a new treatment or application that could serve as an alternative to an official quarantine use of methyl bromide. In its review, APHIS would consider the effectiveness and economic feasibility of the alternative, just as we would in our review of a new request for a determination under proposed § 304.2(b). The State, local, or tribal authority that had requested and received the determination that the methyl bromide treatment or application under review was an official quarantine use would be invited to participate in the review. If, as a result of the review, APHIS finds that the registered alternative is effective and economically feasible, we would rescind the determination that the methyl bromide treatment or application was an official quarantine use. While this proposed review process is not explicitly called for by sec. 419, we believe that it is in keeping with the objectives of the section to provide for such a review.

While the regulations in proposed § 304.2(c) would provide that the Administrator may rescind the determination that a methyl bromide treatment or application is an official quarantine use when a registered, effective, and economically feasible alternative becomes available, we wish to acknowledge the possibility that an alternative may become available that is effective and economically feasible, but that is not subject to registration by EPA (non-chemical treatments such as irradiation have been cited as an example). We are explicitly seeking comment on whether our regulations should take such a possibility into account. Mainly, we are interested in learning if this is a practical consideration, *i.e.*, whether or not you believe that there may actually be instances where an alternative that is not subject to registration by EPA could prove to be an effective and economically feasible application for a particular use, and thus might serve as a desirable alternative to methyl bromide. If indeed this is a practical consideration, should the regulations provide some mechanism for the review, voluntary or otherwise, of a listed treatment or application such as that provided for by proposed § 304.2(c)? We welcome all comments on this subject.

Under proposed paragraph (d), a State, local, or tribal authority that has submitted a request for a determination would, in the event that the Administrator determines that the particular methyl bromide treatment or application should not be authorized as an official quarantine use, have the opportunity to request that the Administrator reconsider his or her determination. This same opportunity would be provided in the event that, as a result of the review process described in the previous paragraph, the Administrator rescinds the determination that a methyl bromide treatment or application was an official quarantine use. In its request for reconsideration, the State, local, or tribal authority would have to provide, in writing, the facts and reasons upon which it is relying to show that the treatment or application should be authorized as an official quarantine use or that the determination should remain in effect. The Administrator would take into account the information provided in the request for reconsideration and any other relevant facts, including the information provided in the original request for determination, and would render a decision as promptly as circumstances permitted. The Administrator's decision, and his or her reasons for that decision, would be communicated to the requestor in writing.

APHIS will consult with EPA as appropriate in the course of evaluating requests to determine whether methyl bromide uses should be authorized as official quarantine uses and whether and when a previously authorized official quarantine use may be removed from the registry.

Submission of Requests

Proposed § 304.3 describes the information that would have to be included in any request to the Administrator for a determination that a methyl bromide application or treatment should be authorized as an official quarantine use. Paragraph (a) would state that the request must be submitted and signed by the executive official or a plant protection official of the State, local, or tribal authority seeking the determination, and must include a copy of the State, local, or tribal regulation or mandatory quarantine procedures under which the methyl bromide treatment or application is required; the name of the crop/use for which the methyl bromide treatment or application is required; the name of the plant pests or noxious weeds targeted for control with methyl bromide; and the location(s) where the methyl bromide treatment or application is carried out. We believe that this specific information, which would be considered along with more general information available to APHIS, would be necessary for the Administrator to be able to make a determination regarding the methyl bromide treatment or application that is the subject of the request. Paragraph (b) would provide an address for the submission of requests.

Registry

Finally, as required by sec. 419(c) of the amended PPA, proposed § 304.4 would state that all State, local, and tribal requirements for methyl bromide applications or treatments that are determined by the Administrator to be official quarantine uses will appear on a registry of such treatments or applications that will be published and maintained by the Administrator. This section would provide an address to which one could write to receive a copy of the registry, as well as an Internet Web site (*http://www.aphis.usda.gov/ppq/bromide/*) where the registry would be posted.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

For this rule, we have prepared an economic analysis. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866, as well as an analysis of the potential economic effects of this proposed rule on small entities, as required under 5 U.S.C. 603. The economic analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

We do not have enough data for a comprehensive analysis of the economic effects of this proposed rule on small entities. Therefore, in accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis for this proposed rule. We are inviting comments about this proposed rule as it relates to small entities. In particular, we are interested in determining the number and kind of small entities who may incur benefits or costs from implementation of this proposed rule and the economic impact of those benefits or costs.

This proposed rule would establish procedures to implement an amendment to the PPA added as part of the Farm Security and Rural Investment Act of 2002. The amendment, a new sec. 419, calls for the Secretary of Agriculture, upon request of State, local, or tribal authorities, to determine whether methyl bromide treatments or applications required by those authorities to prevent the introduction, establishment, or spread of plant pests (including diseases) or noxious weeds should be authorized as official controls or official requirements. The amendment also requires the Secretary to publish and maintain a registry of these authorized uses and to initiate research programs to develop viable methyl bromide alternatives.

A methyl bromide use included in the registry would be termed an official quarantine use. It would be an official quarantine requirement or control of a State, local, or tribal authority for either of the following purposes: (i) For the management of plant pests or noxious weeds of potential importance to the area endangered thereby and not yet present there, or present but not widely distributed; or (ii) to meet official quarantine requirements for the management of economic plant pests in plant material intended for propagation.

Much of U.S. agriculture, especially horticultural production, is currently dependent upon methyl bromide for the control of insects, rodents, nematodes, weeds, and pathogens for quarantine and other purposes. Most methyl bromide is used as a soil fumigant, with significant quantities applied to soils for the production of crops in California and Florida, in particular. Methyl bromide is also applied in post-harvest treatments, both for quarantine purposes and to meet sanitation standards, and as a structural fumigant. Production and consumption of methyl bromide by the United States is to be phased out in 2005, except for uses exempted under the Montreal Protocol and Clean Air Act, including quarantine applications.

Under sec. 419, a determination that a treatment or application should be authorized as an official control or official requirement requires that USDA continue research on alternatives to such uses. USDA, under Agricultural Research Service leadership, is conducting research programs on alternatives for many methyl bromide uses. Section 419 may provide additional focus for new research initiatives on alternatives to methyl bromide used for quarantine purposes, and may bolster ongoing research programs. State, local, or tribal authorities may value federally mandated efforts to develop registered, effective and economically feasible alternatives to quarantine uses of methyl bromide. This interest could be expected to strengthen as the cost of methyl bromide use increases. Section 419 may influence the allocation of research resources, to the extent that it provides specific statutory justification for research on alternatives to methyl bromide used for quarantine purposes.

As a part of the rulemaking process, APHIS evaluates whether proposed regulations are likely to have a significant economic impact on a substantial number of small entities, as required by the Regulatory Flexibility Act. Many, if not most, of the agricultural enterprises that use methyl bromide are small entities. However, the effects of this proposed rule on small, as well as large, entities is not expected to be significant. The new sec. 419 and the proposed regulations would not affect the exemption of quarantine applications from the methyl bromide phaseout. The Administrator of the Environmental Protection Agency will continue to exempt, consistent with the Montreal Protocol and under the authority of the Clean Air Act, quarantine applications of methyl bromide. At most, the requirements of sec. 419 may influence the focus of research on methyl bromide alternatives.

Implementation of sec. 419 will require administering the registry and continuing research programs on alternatives to the official quarantine uses. Under this proposed rule, a determination that a use should be authorized as an official quarantine use would require confirming that a registry candidate is an official quarantine requirement or control of the requesting State, local, or tribal authority and that no registered, effective, and economically feasible alternative is available. Requests for a determination would have to identify the quarantine need for the treatment or application and document the State, local, or tribal regulation or mandatory procedures under which the methyl bromide treatment or application is required.

This proposed rule contains various recordkeeping and reporting requirements. These requirements are described in this document under the heading "Paperwork Reduction Act."

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (*See* 7 CFR part 3015, subpart V.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

National Environmental Policy Act

An environmental assessment has been prepared for this proposed rule. The environmental assessment documents our review of the environmental impacts associated with this proposed rule. We are making the environmental assessment available to the public for review and comment.

The environmental assessment was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Copies of the environmental assessment are available for public inspection in our reading room (information on the location and hours of the reading room is provided under the heading **ADDRESSES** at the beginning of this document). In addition, copies may be obtained by writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. The environmental assessment is also available on the Internet at *http://www.aphis.usda.gov/ppq/enviro_docs/mb.html.*

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. 02–086–1. Please send a copy of your comments to: (1) Docket No. 02–086–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

Under this proposed rule, State, local, or tribal authorities seeking determinations that methyl bromide treatments or applications qualify as official quarantine uses would have to submit written requests to APHIS. These requests would need to include information on the nature and location of the methyl bromide use under consideration and the plant pests or noxious weeds that methyl bromide is needed to control.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.5 hours per response.

Respondents: State, local, and tribal authorities.

Estimated annual number of respondents: 10.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 10.

Estimated total annual burden on respondents: 5 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 7 CFR 304

Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements.

Accordingly, we are proposing to amend 7 CFR chapter III by adding a new part 304 to read as follows:

PART 304—METHYL BROMIDE

Sec.

Authority: 7 U.S.C. 7719; 7 CFR 2.22, 280, and 371.3.

§ 304.1 Definitions.

Administrator. The Administrator of the Animal and Plant Health Inspection Service or any individual authorized to act for the Administrator.

Animal and Plant Health Inspection Service (APHIS). The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

Control. Suppression, containment, or eradication of a pest population.

Official quarantine use. A methyl bromide treatment or application that the Administrator determines to be an official control or official requirement, based on information that the treatment or application is required by a State, local, or tribal authority for either of the following reasons:

(1) For the management of plant pests or noxious weeds of potential importance to the area endangered thereby and not yet present there, or present but not widely distributed; or

(2) To meet official quarantine requirements for the management of economic plant pests in plant material intended for propagation.

Requirement. A treatment or application to prevent the introduction, establishment or spread of pests.

State. Any of the several States of the United States, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

§ 304.2 Requests for determination; review of determinations.

(a) A State, local, or tribal authority may request that the Administrator determine whether a methyl bromide treatment or application required by the

State, local, or tribal authority should be authorized as an official quarantine use.

(b) The Administrator will issue a determination not later than 90 days after the receipt of a request submitted in accordance with § 304.3. A methyl bromide treatment or application will be determined by the Administrator to be an official quarantine use if the treatment or application conforms to the definition of that term in § 304.1, and if the Administrator finds that there is no other registered, effective, and economically feasible alternative available. If the Administrator determines that a methyl bromide treatment or application should not be authorized as an official quarantine use, the Administrator will provide to the requestor, in writing, the reasons for his or her determination.

(c) If a registered alternative to methyl bromide becomes available for a treatment or application that the Administrator has determined to be an official quarantine use, the Administrator will initiate a review to consider the effectiveness and economic feasibility of the alternative. The State, local, or tribal authority that requested and received the determination that the methyl bromide treatment or application under review was an official quarantine use will be invited to participate in the review. If the Administrator finds that the registered alternative is effective and economically feasible, the Administrator will rescind the determination that the methyl bromide treatment or application is an official quarantine use.

(d) If the Administrator determines that a methyl bromide treatment or application should not be authorized as an official quarantine use (see paragraph (b) of this section) or that a determination should be rescinded (*see* paragraph (c) of this section), the affected State, local, or tribal authority may request that the Administrator reconsider his or her determination. Requests for reconsideration may be submitted to the address provided in § 304.3(b). In its request for reconsideration, the State, local, or tribal authority must provide, in writing, the facts and reasons upon which it is relying to show that the treatment or application should be determined to be an official quarantine use or that a determination should remain in effect. The Administrator will take into account the information provided in the request for reconsideration and any other relevant facts, including the information provided in the original request for determination, and will render a decision as promptly as circumstances permit. The Administrator's decision, and his or her reasons for that decision, will be communicated to the requestor in writing.

(e) Consistent with the Montreal Protocol and under the authority of the Clean Air Act, the Administrator of the Environmental Protection Agency (EPA) shall exempt quarantine applications of methyl bromide. APHIS will consult with EPA as appropriate in the course of evaluating requests to determine whether methyl bromide uses should be authorized as official quarantine uses and whether and when a previously authorized official quarantine use may be removed from the registry.

§ 304.3 Submission of requests.

(a) A request for a determination under § 304.2 must be submitted and signed by the executive official or a plant protection official of the State, local, or tribal authority seeking the determination, and must include the following:

(1) A copy of the State, local, or tribal regulation or mandatory quarantine procedures under which the methyl bromide treatment or application is required;

(2) The name of the crop/use for which the methyl bromide treatment or application is required;

(3) The name(s) of the plant pests or noxious weeds targeted for control with methyl bromide; and

(4) The location(s) where the methyl bromide treatment or application is being carried out.

(b) All requests must be submitted to [*address to be added in final rule*].

§ 304.4 Registry.

All State, local, and tribal requirements for methyl bromide applications or treatments that are determined by the Administrator to be official quarantine uses will appear on a registry of such treatments or applications that will be published and maintained by the Administrator. A copy of the registry may be obtained by writing to [*address to be added in final rule*]. The registry may also be viewed on the Internet at http://www.aphis.usda.gov/ppq/bromide/.

Done in Washington, DC, this 9th day of August 2004.

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 04–18445 Filed 8–11–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NE–33–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier-Rotax GmbH Type 912 F, 912 S, and 914 F Series Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) for Bombardier-Rotax GmbH Type 912 F, 912 S, and 914 F series reciprocating engines. That AD currently requires venting of the lubrication system and inspection of the valve train on all engines. That AD also requires venting of the lubrication system of all engines on which the lubrication system has been opened, and any engine on which the propeller has been rotated one full turn in the wrong direction. This proposed AD would require similar actions, and also require removing the existing part number oil dipstick from service and installing a new oil dipstick. This proposed AD results from the need to clarify the mandated procedures for inspections and venting. This proposed AD also results from the manufacturer discovering that under certain circumstances, the oil level in the oil tank can fall below the minimum level required to sustain proper engine lubrication. We are proposing this AD to prevent damage to the engine valve train due to inadequate venting of the lubrication system, which can result in an in-flight engine failure and forced landing.

DATES: We must receive any comments on this proposed AD by October 12, 2004.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD:

- *By mail:* Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–NE–33–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- *By fax:* (781) 238–7055.
- *By e-mail: 9-ane-adcomment@faa.gov.*

You can get the service information identified in this proposed AD from Bombardier-Rotax GmbH, Gunskirchen,

Austria; telephone 7246–601–423; fax 7246–601–760.

You may examine the AD docket at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Richard Woldan, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park; telephone (781) 238–7136; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include "AD Docket No. 2002–NE–33–AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. If a person contacts us verbally, and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications that affect you. You may get more information about plain language at *http://www.faa.gov/language* and *http://www.plainlanguage.gov.*

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Discussion

On October 17, 2002, we issued AD 2002–21–16, Amendment 39–12923 (67 FR 65033, October 23, 2002). That AD requires:

- Before further flight, inspecting the engine valve train, venting the lubrication system, and inspecting for the correct venting of the oil system.
- Thereafter, before engine start, properly venting the lubrication system after initial installation of a new or overhauled engine, after opening the oil system, after an engine oil change, and after the propeller was rotated one full turn in the wrong direction of rotation, allowing air to be ingested into the valve train components.

Austro Control, which is the airworthiness authority for Austria, notified us that an unsafe condition may exist on Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines. Austro Control advised that there have been seven in-flight engine failures that occurred within 50 hours time-in-service (TIS) after installation of a new or overhauled engine. Investigations by Austro Control indicate that the failures were due to inadequate venting of the lubrication systems. Inadequate venting of the lubrication system can cause damage to the engine valve train as a result of compression of trapped air while at maximum camshaft speed resulting in high impact stresses to valve train components.

Actions After AD 2002–21–16 Was Issued

After AD 2002–21–16 was issued, Austro Control advised that there have been 11 in-flight engine failures due to an oil tank level that is too low causing induction of air into the oil system and higher than anticipated pressures through the valve push rods. Investigations by Austro Control indicate that the failures were due to slower than anticipated return of oil from the engine crankcase back to the oil tank. Changes to the viscous properties of the oil cause a slower return of oil to the oil tank. This slow return results in the oil level in the oil tank falling below the minimum level required. An oil level that is too low causes induction of air into the oil system and higher than anticipated pressures through the valve push rods. That higher pressure causes damage to the components of the engine valve train. To help prevent this condition, Rotax introduced a new engine oil dipstick that has higher level indicator marks, which requires a greater quantity of oil in the oil tank. This increased quantity of oil helps prevent the induction of air into the oil system.

Also, after AD 2002–21–16 was issued, we found that some corrections and clarifications are required. In the **ADDRESSES** paragraph, this proposal corrects the address and telephone numbers for the Rotax service information. Also, this proposal revises the compliance section for clarification of the inspections and venting to more closely match the related Austro Control AD.

Relevant Service Information

We have reviewed and approved the technical contents of Bombardier-Rotax GmbH Mandatory Service Bulletin (MSB) No. SB–912–036/SB–914–022, Revision 1, dated August 2002. This MSB provides procedures for inspecting engines for correct venting of the oil system and procedures for inspecting the valve train for damage caused by inadequate venting. Austro Control has classified this service bulletin as mandatory and issued AD No.113R1 in order to assure the airworthiness of these Bombardier-Rotax GmbH engines in Austria.

Differences Between the Proposed AD and the Service Information

Bombardier-Rotax GmbH MSB SB–912–036/SB–914–022 allows up to 5 hours TIS before venting and inspecting for correct venting of the oil system on engines with 50 hours or less TIS since the lubrication system has been opened and drained, since an oil change was performed using improper procedures, or since the propeller was rotated more than one turn in the wrong direction of rotation. We have determined that the venting and inspecting of the valve train must be done before the next engine start.

Bilateral Agreement Information

This engine model is manufactured in Austria and is type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. In keeping with this bilateral airworthiness agreement, Austro Control has kept us informed of the situation described above. We have examined the findings of Austro Control, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. Therefore, we are proposing this AD, which would require:

- Before the next engine start for engines with 50 hours or less TIS on the effective date of the AD, since the engine had the oil system opened, or the oil was changed using other than

specified procedures, or the propeller was rotated more than one turn in the wrong direction of rotation, inspecting for valve train damage, properly venting the lubrication system and inspecting for the correct venting of the hydraulic valve tappets.

• Thereafter, for all engines, before engine start, properly venting the lubrication system after initial installation of a new or overhauled engine, after opening the oil system, after changing the oil using improper procedures, or after the propeller was rotated more than one turn in the wrong direction of rotation, allowing air to be ingested into the valve train components.

• At the next oil change, or within 100 hours TIS after the effective date of the AD, whichever is later, removing the oil dipstick, part number (P/N) 956150, from service, and installing a serviceable dipstick that has a different P/N.

The proposed AD would require that you do the venting of the lubrication system using the service information described previously.

Costs of Compliance

There are about 624 Bombardier-Rotax GmbH Type 912 F, 912 S, and 914 F series reciprocating engines of the affected design in the worldwide fleet. We estimate that 282 engines installed on aircraft of U.S. registry would be affected by this proposed AD. We also estimate that it would take about one work hour per engine to perform one oil system inspection and venting, and that the average labor rate is $65 per work hour. Required parts would cost about $0.85 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $18,570.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this proposal and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket No. 2002–NE–33–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing Amendment 39–12923 (67 FR 65033, October 23, 2002) and by adding a new airworthiness directive, to read as follows:

Bombardier-Rotax GmbH: Docket No. 2002–NE–33–AD. Supersedes AD 2002–21–16, Amendment 39–12923.

Comments Due Date

(a) The FAA must receive comments on this airworthiness directive (AD) action by October 12, 2004.

Affected ADs

(b) This AD supersedes AD 2002–21–16, Amendment 39–12923.

Applicability

(c) This AD applies to Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines. These engines are installed on, but not limited to, Diamond Aircraft Industries, DA20–A1, Diamond Aircraft Industries GmbH Model HK 36 TTS, Model HK 36TTC, and Model HK 36 TTC–ECO, Iniziative Industriali Italiane S.p.A. Sky Arrow 650 TC and Sky Arrow 650 TCN, Aeromot-Industria Mecanico Metalurgica ltda., Models AMT–300 and AMT–200S, and Stemme S10–VT aircraft.

Unsafe Condition

(d) This AD results from the manufacturer discovering that under certain circumstances, the oil level in the oil tank can fall below the minimum level required to sustain proper engine lubrication. The actions specified in this AD are intended to prevent damage to the engine valve train due to inadequate venting of the lubrication system, which can result in an in-flight engine failure and forced landing.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

Initial Venting and Inspection for Correct Venting

(f) Before the next engine start, for all Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines that have not been operated since doing any of the actions identified in Section 1.5 (a) of Rotax Mandatory Service Bulletin (MSB) SB–912–036/SB–914–022, Revision 1, dated August 2002, do the following:

(1) Perform venting of the lubrication system; and

(2) Perform inspection for correct venting of the hydraulic valve tappets. Use Section 3.1.1 through Section 3.1.4 of the Accomplishment Instructions of Rotax MSB SB–912–036/SB–914–022, Revision 1, dated August 2002 to do the venting and inspection.

Inspection of Engine Valve Train

(g) Before the next engine start, for all Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines that have been operated for 50 hours or less on the effective date of this AD since doing any of the actions identified in Section 1.5 (b) of Rotax Mandatory Service bulletin (MSB) SB–912–036/SB–914–022, Revision 1, dated August 2002, do the following:

(1) Disassemble and perform inspection of the engine valve train; and

(2) Reassemble, vent the lubrication system, and inspect for correct venting of the hydraulic valve tappets. Use Section 3.1.5 through Section 3.1.7 of the Accomplishment Instructions of Rotax MSB SB–912–036/SB–914–022, Revision 1, dated August 2002.

Repetitive Venting of the Lubrication System

(h) Thereafter, for all Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines, after doing any of the actions in the following paragraphs (h)(1) through (h)(4), vent the lubrication system and inspect for correct venting of the hydraulic valve tappets before starting the engine. Use Section 3.1.1 through Section 3.1.4 of the Accomplishment Instructions of Rotax MSB SB–912–036/SB–914–022, Revision 1, dated August 2002 to do the venting and inspecting.

(1) The installation of a new or overhauled engine.

(2) The oil system has been opened allowing air to enter the valve train (*e.g.* oil pump, oil cooler, oil suction line removed which allows oil to drain from the engine oil galleries).

(3) The engine oil was changed using procedures other than those included in Section 1.2 of Rotax MSB SB–912–036/SB–914–022 Revision 1, dated August 2002.

(4) The propeller was turned more than one turn in the wrong direction of rotation.

Removal of Existing Oil Dipstick From Service

(i) At the next oil change or within 100 hours TIS after the effective date of this AD,

whichever is later, remove the oil dipstick, part number (P/N) 956150, from service, and install a dipstick that has a different P/N. Information on removing oil dipstick P/N 956150 from service can be found in Rotax Service Bulletin SB–912–040/SB–914–026, Revision 1, dated August 2003.

Prohibition of Oil Dipstick, P/N 956150

(j) After the effective date of this AD, do not use dipstick P/N 956150 after complying with paragraph (i) of this AD.

Alternative Methods of Compliance

(k) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Special Flight Permits

(l) Special flight permits are not permitted.

Material Incorporated by Reference

(m) None.

Related Information

(n) Austro Control airworthiness directives No. 113R1, dated August 30, 2002, and No. 116, dated September 15, 2003, Rotax Service Bulletin SB–912–040/SB–914–026, Revision 1, dated August 2003, and Rotax Service Instruction SI–04–1997, Revision 3, dated September 2002 also address the subject of this AD.

Issued in Burlington, Massachusetts, on August 6, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–18440 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–128767–04]

RIN 1545–BD48

Treatment of Disregarded Entities Under Section 752

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The proposed regulations provide rules under section 752 for taking into account certain obligations of a business entity that is disregarded as separate from its owner under sections 856(i), 1361(b)(3), or §§ 301.7701–1 through 301.7701–3 (disregarded entity) for purposes of characterizing and allocating partnership liabilities. The rules affect partnerships with partnership debt and partners in those partnerships. These proposed regulations clarify the existing regulations concerning when a partner may be treated as bearing the economic risk of loss for a partnership liability based upon an obligation of a disregarded entity.

DATES: Written or electronic comments and requests for a public hearing must be received by November 10, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–128767–04), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–128767–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at: *http://www.irs.gov/regs*, or via the Federal eRulemaking Portal at: *http://www.regulations.gov* (IRS-REG–128767–04).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael J. Goldman, (202) 622–3070; concerning submissions of the comments and the public hearing, Robin Jones, (202) 622–3521 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by October 12, 2004. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in § 1.752–2(k). This information is required to ensure proper allocations of partnership liabilities. This information will be used to determine the extent to which certain partners or related persons bear the economic risk of loss with respect to partnership liabilities. The collection of information is mandatory. The likely reporters are individuals and small businesses or organizations.

Estimated total annual reporting burden: 500 hours.

The estimated annual burden per respondent varies from 6 minutes to 2 hours, depending on individual circumstances, with an estimated average of 1 hour.

Estimated number of respondents: 500.

Estimated frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Under section 752, a partner's basis in its partnership interest includes the partner's share of partnership liabilities. The Income Tax Regulations under section 752 provide rules relating to the determination of a partner's share of partnership liabilities. Those rules differ depending upon whether the liability is characterized as recourse or nonrecourse for purposes of section 752. Section 1.752–1(a) provides that a partnership liability is a recourse liability to the extent that any partner or related person bears the economic risk of loss for that liability under § 1.752–2. Section 1.752–1(a) also provides that a partnership liability is a nonrecourse liability to the extent that no partner or related person bears the economic risk of loss for that liability under § 1.752–2.

In general, a partner bears the economic risk of loss for a partnership

liability under § 1.752–2 to the extent that the partner or a related person (as defined in § 1.752–4(b)) has an obligation to make a payment to any person, including a contribution to the partnership, that is recognized under § 1.752–2(b)(3) on account of the partnership liability if the partnership were to constructively liquidate as described in § 1.752–2(b) (payment obligation). As provided in § 1.752–2(b)(3) and (5), all statutory and contractual obligations relating to the partnership liability and reimbursement rights are taken into account in determining whether a partner or related person has a payment obligation under § 1.752–2(b). Moreover, for purposes of determining the extent to which a partner or related person has a payment obligation and the economic risk of loss for a partnership liability, § 1.752–2(b)(6) provides that it is presumed that all partners and related persons who have obligations to make payments actually perform those obligations, irrespective of their actual net worth (presumption of deemed satisfaction), unless the facts and circumstances indicate a plan to circumvent or avoid the obligation.

These proposed regulations clarify the existing regulations concerning when a partner may be treated as bearing the economic risk of loss for a partnership liability based upon a payment obligation of a business entity that is disregarded as separate from its owner under sections 856(i), 1361(b)(3), or §§ 301.7701–1 through 301.7701–3 of this chapter (disregarded entity). Because a disregarded entity and its owner are treated as a single entity, the presumption of deemed satisfaction of obligations undertaken by the owner arguably should include payment obligations undertaken by the disregarded entity. However, because of statutory limitations on liability, the owner of a disregarded entity may have no obligation to satisfy payment obligations undertaken by the disregarded entity. The current regulations consider such limitations on the payment obligations of a partner or related person to be relevant in determining the extent to which the partner or related person is treated as bearing the economic risk of loss for a partnership liability. The IRS and Treasury Department believe that because only the assets of a disregarded entity may be available to satisfy payment obligations undertaken by the disregarded entity, a partner should be treated as bearing the economic risk of loss for a partnership liability as a result of those payment obligations only to the extent of the net value of the disregarded entity's assets.

Explanation of Provisions

The proposed regulations provide that in determining the extent to which a partner bears the economic risk of loss for a partnership liability, payment obligations of a disregarded entity are taken into account for purposes of section 752 only to the extent of the net value of the disregarded entity as of the date on which the partnership determines the partner's share of partnership liabilities pursuant to §§ 1.752–4(d) and 1.705–1(a). However, the proposed regulations do not apply to an obligation of a disregarded entity to the extent that the owner of the disregarded entity otherwise is required to make a payment (that satisfies the requirements of § 1.752–2(b)(1)) with respect to such obligation of the disregarded entity.

Under the proposed regulations, the net value of a disregarded entity equals the fair market value of all assets owned by the disregarded entity that may be subject to creditors' claims under local law, including the disregarded entity's enforceable rights to contributions from its owner but excluding the disregarded entity's interest in the partnership (if any) and the fair market value of property pledged to secure a partnership liability (which is already taken into account under § 1.752–2(h)(1)), less obligations of the disregarded entity that do not constitute, and are senior or of equal priority to, payment obligations of the disregarded entity. After the net value of a disregarded entity is initially determined under the rules of the proposed regulations, the net value of the disregarded entity is not redetermined unless the obligations of the disregarded entity that do not constitute, and are senior or of equal priority to, payment obligations of the disregarded entity change by more than a de minimis amount or there is more than a de minimis contribution to or distribution from the disregarded entity. The IRS and Treasury Department request comments on whether other events (such as a sale of substantially all of a disregarded entity's assets) should be specified as revaluation events and whether a partner should be able to make an election to revalue a disregarded entity annually regardless of the occurrence of a revaluation event. An election to revalue annually would be revocable only with the Commissioner's consent.

The proposed regulations also provide that the net value of a disregarded entity is determined by taking into account a subsequent reduction in the net value of the entity if the subsequent reduction is anticipated and is part of a plan that has as one of its principal purposes creating the appearance that a partner bears the economic risk of loss for a partnership liability. In addition, under the proposed regulations, if one or more disregarded entities have payment obligations with respect to one or more partnership liabilities, or liabilities of more than one partnership, the partnership must allocate the net value of each disregarded entity among partnership liabilities in a reasonable and consistent manner, taking into account priorities among partnership liabilities.

To facilitate the partnership's determination of the net value of a disregarded entity, the proposed regulations provide that a partner that may be treated as bearing the economic risk of loss for a partnership liability based upon a payment obligation of a disregarded entity must provide information as to the entity's tax classification and net value to the partnership on a timely basis.

The IRS and Treasury Department are considering and request comments regarding whether the rules of the proposed regulations should be extended to the payment obligations of other entities, such as entities that are capitalized with nominal equity.

The proposed regulations also include conforming changes to § 1.704–2(f)(2), (g)(3) and (i)(4). Section 1.704–2 includes rules that apply when the character of partnership debt under section 752 changes as a result of a guarantee, lapse of a guarantee, conversion, refinancing or other change in the debt instrument. Under the proposed regulations, those rules would apply upon any change in the character of partnership debt under section 752, whether as a result of the circumstances specified in the current regulations or as a result of changes under the rules of the proposed regulations.

Finally, the proposed regulations clarify that the pledge rules of the regulations under § 1.752–2(h) refer to the net fair market value of property pledged to secure a partnership liability. The IRS and Treasury Department are considering and request comments regarding whether partners should be able to make an election, revocable only with the Commissioner's consent, to revalue pledged assets annually.

Proposed Effective Date

The regulations are proposed to apply to liabilities incurred or assumed by a partnership on or after the date the regulations are published as final regulations in the **Federal Register**,

other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time necessary to report the required information will be minimal. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules, how they can be made easier to understand and the administrability of the rules in the proposed regulations. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Michael J. Goldman of the Office of Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.704–2 is amended as follows:

1. Paragraph (f)(2) is revised.
2. The first sentence of paragraph (g)(3) is revised.
3. The third sentence of paragraph (i)(4) is revised.
4. Paragraph (l)(1)(iv) is added.

The revisions and addition read as follows:

§ 1.704–2 Allocations attributable to nonrecourse liabilities.

* * * * *

(f) * * *

(2) *Exception for certain conversions and refinancings.* A partner is not subject to the minimum gain chargeback requirement to the extent the partner's share of the net decrease in partnership minimum gain is caused by a recharacterization of nonrecourse partnership debt as partially or wholly recourse debt or partner nonrecourse debt, and the partner bears the economic risk of loss (within the meaning of § 1.752–2) for the liability.

* * * * *

(g) * * *

(3) *Conversions of recourse or partner nonrecourse debt into nonrecourse debt.* A partner's share of minimum gain is increased to the extent provided in this paragraph (g)(3) if a recourse or partner nonrecourse liability becomes partially or wholly nonrecourse. * * *

* * * * *

(i) * * *

(4) * * * A partner is not subject to this minimum gain chargeback, however, to the extent the net decrease in partner nonrecourse debt minimum gain arises because a partner nonrecourse liability becomes partially or wholly a nonrecourse liability. * * *

* * * * *

(l) * * * (1) * * *

(iv) Paragraph (f)(2), the first sentence of paragraph (g)(3), and the third sentence of paragraph (i)(4) of this section apply to liabilities incurred or assumed by a partnership on or after the date the regulations are published as final regulations in the **Federal Register**, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. Otherwise, the rules applicable to liabilities incurred or assumed (or subject to a binding contract in effect) prior to the date the regulations are published as final regulations in the **Federal Register** are contained in § 1.704–2 in effect prior to the date the regulations are published as final regulations in the **Federal Register** (see 26 CFR part 1 revised as of April 1, 2004).

* * * * *

Par. 3. Section 1.752–2 is amended as follows:

1. Paragraph (a) is revised.
2. The last sentence of paragraph (b)(6) is revised.
3. Paragraph (h)(3) is revised.
4. Paragraphs (k) and (l) are added.

The revisions and additions read as follows:

§ 1.752–2 Partner's share of recourse liabilities.

(a) *In general.* A partner's share of a recourse partnership liability equals the portion of that liability, if any, for which the partner or related person bears the economic risk of loss. The determination of the extent to which a partner bears the economic risk of loss for a partnership liability is made under the rules in paragraphs (b) through (k) of this section.

(b) * * *

(6) * * * See paragraphs (j) and (k) of this section.

* * * * *

(h) * * *

(3) *Valuation.* The extent to which a partner bears the economic risk of loss for a partnership liability as a result of a direct pledge described in paragraph (h)(1) of this section or an indirect pledge described in paragraph (h)(2) of this section is limited to the net fair market value of the property at the time of the pledge or contribution. For purposes of this paragraph, if property is subject to one or more other obligations that are senior or of equal priority to the partnership liability, those obligations must be taken into account in determining the net fair market value of pledged property.

* * * * *

(k) *Effect of a disregarded entity*—(1) *In general.* In determining the extent to which a partner bears the economic risk of loss for a partnership liability, obligations of a business entity that is disregarded as an entity separate from its owner under sections 856(i) or 1361(b)(3) or §§ 301.7701–1 through 301.7701–3 of this chapter (disregarded entity), that may be taken into account under paragraph (b)(1) of this section, are taken into account only to the extent

of the net value of the disregarded entity (as determined under paragraph (k)(2) of this section) as of the date on which the partnership determines the partner's share of partnership liabilities pursuant to §§ 1.752–4(d) and 1.705–1(a) that is allocated to the liability under paragraph (k)(4) of this section. The rules of this paragraph (k) do not apply to an obligation of a disregarded entity to the extent that the owner of the disregarded entity otherwise is required to make a payment (that satisfies the requirements of paragraph (b)(1) of this section) with respect to such obligation of the disregarded entity.

(2) *Net value of a disregarded entity.* For purposes of paragraph (k)(1) of this section, the net value of a disregarded entity equals the fair market value of all assets owned by the entity that may be subject to creditors' claims under local law, including the entity's enforceable rights to contributions from its owner but excluding the entity's interest in the partnership (if any) and the fair market value of property pledged to secure a partnership liability under paragraph (h)(1) of this section, less obligations of the disregarded entity that do not constitute, and are senior or of equal priority to, obligations of the disregarded entity that may be taken into account under paragraph (b)(1) of this section. After the net value of a disregarded entity is initially determined for purposes of paragraph (k)(1) of this section, the net value of the disregarded entity is not redetermined unless the obligations of the disregarded entity that are described in the preceding sentence change by more than a *de minimis* amount or there is more than a *de minimis* contribution to or distribution from the disregarded entity of property other than property pledged to secure a partnership liability under paragraph (h)(1) of this section.

(3) *Reduction in net value of a disregarded entity.* For purposes of paragraph (k)(2) of this section, the net value of a disregarded entity is determined by taking into account a subsequent reduction in the net value of the disregarded entity if at the time the net value of the disregarded entity is determined it is anticipated that the net value of the disregarded entity will subsequently be reduced and the reduction is part of a plan that has as one of its principal purposes creating the appearance that a partner bears the economic risk of loss for a partnership liability.

(4) *Allocation of net value.* If one or more disregarded entities have obligations that may be taken into account under paragraph (b)(1) of this section with respect to one or more partnership liabilities, or liabilities of more than one partnership, the partnership must allocate the net value of each disregarded entity among partnership liabilities in a reasonable and consistent manner, taking into account priorities among partnership liabilities.

(5) *Information to be provided by the owner of a disregarded entity.* A partner that may be treated as bearing the economic risk of loss for a partnership liability based upon an obligation of a disregarded entity that may be taken in account under paragraph (b)(1) of this section must provide information as to the entity's tax classification and net value to the partnership on a timely basis.

(6) The following examples illustrate the rules of this paragraph (k):

Example 1. Disregarded entity with net value of zero. (i) In 2005, *A* forms a wholly owned domestic limited liability company, *LLC*, with a contribution of $100,000. *A* has no liability for *LLC's* debts, and *LLC* has no enforceable right to contribution from *A*. *A* files no election with respect to *LLC* under § 301.7701–3 of this chapter. Also in 2005, *LLC* contributes $100,000 to *LP*, a limited partnership with a calendar year taxable year, in exchange for a general partnership interest in *LP*, and B and C each contributes $100,000 to *LP* in exchange for a limited partnership interest in *LP*. The partnership agreement provides that only *LLC* is required to make up any deficit in its capital account. On January 1, 2006, *LP* borrows $300,000 from a bank and uses $600,000 to purchase nondepreciable property. The $300,000 debt is secured by the property and is also a general obligation of *LP*. *LP* makes payments of only interest on its $300,000 debt during 2006. Under §§ 1.752–4(d) and 1.705–1(a), *LP* determines its partners' shares of the $300,000 debt at the end of its taxable year, December 31, 2006. As of that date, *LLC* holds no assets other than its interest in *LP*.

(ii) Under § 301.7701–3(b)(1)(ii) of this chapter, *LLC* is a disregarded entity. Because *LLC* is a disregarded entity, *A* is treated as the partner in *LP* for federal tax purposes. Only *LLC* has an obligation to make a payment on account of the $300,000 debt if *LP* were to constructively liquidate as described in paragraph (b)(1) of this section. Therefore, under paragraph (k) of this section, *A* is treated as bearing the economic risk of loss for *LP's* $300,000 debt only to the extent of *LLC's* net value. Because that net value is $0 on December 31, 2006, when *LP* determines its partners' shares of its $300,000 debt, *A* is not treated as bearing the economic risk of loss for any portion of *LP's* $300,000 debt. As a result, *LP's* $300,000 debt is characterized as nonrecourse under § 1.752–1(a) and is allocated as required by § 1.752–3.

Example 2. Disregarded entity with positive net value. (i) The facts are the same as in *Example 1* except that on January 1, 2007, *A* contributes $250,000 to *LLC* and *LLC* shortly thereafter uses the $250,000 to purchase unimproved land. *LP* makes payments of only interest on its $300,000 debt during 2007. Under §§ 1.752–4(d) and 1.705–1(a), *LP* again determines its partners' shares of the $300,000 debt at the end of its taxable year, December 31, 2007. As of that date, *LLC* holds its interest in *LP* and the land, the value of which has declined to $175,000.

(ii) *A's* contribution of $250,000 to *LLC* on January 1, 2007, constitutes a more than *de minimis* contribution of property to *LLC*. Accordingly, under paragraph (k)(2) of this section, *LLC's* value is redetermined on December 31, 2007, when *LP* determines its partners' shares of its $300,000 debt. As of that date, *LLC's* net value is $175,000. Therefore, under paragraph (k) of this section, *A* is treated as bearing the economic risk of loss for $175,000 of *LP's* $300,000 debt. As a result, $175,000 of *LP's* $300,000 debt is recharacterized as recourse under § 1.752–1(a) and is allocated to *A* under this section, and the remaining $125,000 of *LP's* $300,000 debt remains characterized as nonrecourse under § 1.752–1(a) and is allocated as required by § 1.752–3.

Example 3. Allocation of net value among partnership liabilities. (i) The facts are the same as in *Example 2* except that on January 1, 2008, *A* forms another wholly owned domestic limited liability company, *LLC2*, with a contribution of $120,000. Shortly thereafter, *LLC2* uses the $120,000 to purchase stock in X corporation. *A* has no liability for *LLC2's* debts, and *LLC2* has no enforceable right to contribution from *A*. *A* files no election with respect to *LLC2* under § 301.7701–3 of this chapter. On July 1, 2008, *LP* borrows $100,000 from a bank and uses the $100,000 to purchase nondepreciable property. The $100,000 debt is secured by the property and is also a general obligation of *LP*. The $100,000 debt is senior in priority to *LP's* existing $300,000 debt. Also on July 1, 2008, *LLC2* agrees to guarantee both *LP's* $100,000 and $300,000 debts. *LP* makes payments of only interest on both its $100,000 and $300,000 debts during 2008. Under §§ 1.752–4(d) and 1.705–1(a), *LP* determines its partners' shares of its $100,000 and $300,000 debts at the end of its taxable year, December 31, 2008. As of that date, *LLC* holds its interest in *LP* and the land, and *LLC2* holds the X corporation stock which has appreciated in value to $140,000.

(ii) Under § 301.7701–3(b)(1)(ii) of this chapter, *LLC2* is a disregarded entity. Both *LLC* and *LLC2* have obligations to make a payment on account of *LP's* debts if *LP* were to constructively liquidate as described in paragraph (b)(1) of this section. Therefore, under paragraph (k) of this section, *A* is treated as bearing the economic risk of loss for *LP's* $100,000 and $300,000 debts only to the extent of the net values of *LLC* and *LLC2*, as allocated among those debts in a reasonable manner pursuant to paragraph (k)(4) of this section.

(iii) No events have occurred that would allow a revaluation under paragraph (k)(2) of this section. Therefore, *LLC's* net value remains $175,000. *LLC2's* net value on December 31, 2008, when *LP* determines its partners' shares of its liabilities, is $140,000. Under paragraph (k)(4) of this section, *LP* must allocate the net values of *LLC* and *LLC2* between its $100,000 and $300,000 debts in

a reasonable and consistent manner. Because the $100,000 debt is senior in priority to the $300,000 debt, *LP* first allocates the net values of *LLC* and *LLC2, pro rata,* to its $100,000 debt. Thus, *LP* allocates $56,000 of *LLC's* net value and $44,000 of *LLC2's* net value to its $100,000 debt, and *A* is treated as bearing the economic risk of loss for all of *LP's* $100,000 debt. As a result, all of *LP's* $100,000 debt is characterized as recourse under § 1.752–1(a) and is allocated to *A* under this section. *LP* then allocates the remaining $119,000 of *LLC's* net value and *LLC2's* $96,000 net value to its $300,000 debt, and *A* is treated as bearing the economic risk of loss for a total of $215,000 of the $300,000 debt. As a result, $215,000 of *LP's* $300,000 debt is characterized as recourse under § 1.752–1(a) and is allocated to *A* under this section, and the remaining $85,000 of *LP's* $300,000 debt is characterized as nonrecourse under § 1.752–1(a) and is allocated as required by § 1.752–3. This example illustrates one reasonable method for allocating net values of disregarded entities among multiple partnership liabilities.

(l) *Effective dates.* Paragraphs (a), (b)(6), (h)(3), and (k) of this section apply to liabilities incurred or assumed by a partnership on or after the date the regulations are published as final regulations in the **Federal Register,** other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. Otherwise, the rules applicable to liabilities incurred or assumed (or subject to a binding contract in effect) prior to the date the regulations are published as final regulations in the **Federal Register** are contained in §§ 1.752–2 and 1.752–3 in effect prior to the date the regulations are published as final regulations in the **Federal Register,** (*see* 26 CFR part 1 revised as of April 1, 2004).

Approved: July 12, 2004.

Nancy Jardini,

Acting Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–18372 Filed 8–11–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106889–04]

RIN 1545–BD31

Reorganizations Under Section 368(a)(1)(E) or (F)

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance regarding the requirements for a transaction to qualify as a reorganization under section 368(a)(1)(E) or (F) of the Internal Revenue Code. The proposed regulations will affect corporations and their shareholders.

DATES: Written or electronic comments and requests for a public hearing must be received by November 10, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–106889–04), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–106889–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the Internal Revenue Service Internet site at *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–106889–04).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Robert B. Gray, (202) 622–7550; concerning submissions of comments, Guy R. Traynor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

In general, upon the exchange of property, gain or loss must be accounted for if the new property differs materially, in kind or extent, from the old property. See Internal Revenue Code (Code) § 1001; § 1.368–1(b). The purpose of the reorganization provisions of the Internal Revenue Code (the Code) is to except from the general rule certain specifically described exchanges that are required by business exigencies and effect only a readjustment of continuing interests in property under modified corporate forms. *See* § 1.368–1(b).

Section 368(a)(1)(E) provides that the term reorganization includes a recapitalization (an E reorganization). A recapitalization has been defined as a "reshuffling of a capital structure within the framework of an existing corporation." *Helvering* v. *Southwest Consolidated Corp.,* 315 U.S. 194 (1942).

Section 368(a)(1)(F) provides that the term reorganization includes a mere change in identity, form, or place of organization of one corporation, however effected (an F reorganization). One court has described the F reorganization as follows:

> [The F reorganization] encompass[es] only the simplest and least significant of corporate changes. The (F)-type reorganization presumes that the surviving corporation is the same corporation as the predecessor in every respect, except for minor or technical differences. For instance, the (F) reorganization typically has been understood to comprehend only such insignificant modifications as the reincorporation of the same corporate business with the same assets and the same stockholders surviving under a new charter either in the same or in a different State, the renewal of a corporate charter having a limited life, or the conversion of a U.S.-chartered savings and loan association to a State-chartered institution.

Berghash v. *Commissioner,* 43 T.C. 743, 752 (1965) (citation and footnotes omitted), *aff'd,* 361 F.2d 257 (2nd Cir. 1966).

To qualify as a reorganization, a transaction must generally satisfy not only the statutory requirements of the reorganization provisions but also certain nonstatutory requirements, including the continuity of interest and continuity of business enterprise requirements. *See* § 1.368–1(b). The purpose of the continuity requirements is to ensure that reorganizations are limited to readjustments of continuing interests in property under modified corporate form and to prevent transactions that resemble sales from qualifying for nonrecognition of gain or loss available to corporate reorganizations. § 1.368–1(d)(1) and (e)(1); *see also LeTulle* v. *Scofield,* 308 U.S. 415 (1940); *Helvering* v. *Minnesota Tea Co.,* 296 U.S. 378 (1935); *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 287 U.S. 462 (1933).

Despite the general rule, the courts and the Service have taken the position that the continuity of interest and continuity of business enterprise requirements need not be satisfied for a transaction to qualify as an E reorganization. *See Hickok* v. *Commissioner,* 32 T.C. 80 (1959); Rev. Rul. 82–34 (1982–1 C.B. 59); Rev. Rul. 77–415 (1977–2 C.B. 311). In Revenue Rulings 77–415 and 82–34, the IRS reasoned that the continuity of interest and continuity of business enterprise requirements are necessary in an acquisitive reorganization to ensure that the transaction does not involve an otherwise taxable transfer of stock or assets, but that they are not necessary when the transaction involves only a single corporation.

Although an F reorganization may involve an actual or deemed transfer of assets from one corporation to another, such a transaction effectively involves only one corporation. In this way, an F reorganization is much like an E

reorganization, which can only involve one corporation even in form. As a result, an F reorganization is treated for most purposes of the Code as if the reorganized corporation were the same entity as the corporation in existence before the reorganization. Consequently, the taxable year of the corporation does not end on the date of the transfer, and the losses of the reorganized corporation can be carried back to offset income of its predecessor. *See* § 1.381(b)–1(a)(2). Nonetheless, courts have applied the continuity requirements in determining whether a transaction qualifies as an F reorganization. *See, e.g., Pridemark, Inc.* v. *Commissioner,* 345 F.2d 35 (4th Cir. 1965) (stating that the application of the F reorganization statute is limited to cases where the corporate enterprise continues uninterrupted, except perhaps for a distribution of some of its liquid assets); *Yoc Heating Corp.* v. *Commissioner,* 61 T.C. 168 (1973) (holding that continuity of interest is required for an F reorganization).

The Service and the Treasury Department have considered whether continuity of interest and continuity of business enterprise should be requirements of an F reorganization. Because F reorganizations involve only the slightest change in a corporation and do not resemble sales, the Service and the Treasury Department have concluded that applying the continuity of interest and continuity of business enterprise requirements to transactions that would otherwise qualify as F reorganizations is not necessary to protect the policies underlying the reorganization provisions. Therefore, these proposed regulations provide that a continuity of interest and a continuity of business enterprise are not required for a transaction to qualify as an F reorganization. In addition, to reflect the IRS' position in Revenue Rulings 77–415 and 82–34, these proposed regulations provide that a continuity of interest and a continuity of business enterprise are not required for a transaction to qualify as an E reorganization.

In light of the proposed rules regarding the application of the continuity requirements to transactions that otherwise qualify as F reorganizations, the IRS and the Treasury Department believe it is desirable to provide guidance regarding the characteristics of F reorganizations. These regulations propose such criteria.

Consistent with section 368(a)(1)(F), the proposed regulations provide that, to qualify as an F reorganization, a transaction must result in a mere change in identity, form, or place of organization of one corporation. The proposed regulations further provide that a transaction that involves an actual or deemed transfer is a mere change only if four requirements are satisfied. First, all the stock of the resulting corporation, including stock issued before the transfer, must be issued in respect of stock of the transferring corporation. Second, there must be no change in the ownership of the corporation in the transaction, except a change that has no effect other than that of a redemption of less than all the shares of the corporation. Third, the transferring corporation must completely liquidate in the transaction. Fourth, the resulting corporation must not hold any property or have any tax attributes (including those specified in section 381(c)) immediately before the transfer.

The first two requirements reflect the Supreme Court's holding in *Helvering* v. *Southwest Consolidated,* 315 U.S. 194 (1942), that a transaction that shifts the ownership of the proprietary interests in a corporation cannot be a mere change. These requirements prevent a transaction that involves the introduction of a new shareholder or new capital into the corporation from qualifying as an F reorganization. Such an introduction may occur, for example, when a new shareholder contributes assets to the resulting corporation in exchange for stock before a merger of the transferring corporation into the resulting corporation. Notwithstanding these requirements, the proposed regulations permit the resulting corporation's issuance of a nominal amount of stock not in respect of stock of the transferring corporation to facilitate the organization of the resulting corporation. This rule is designed to permit reincorporation in a jurisdiction that requires, for example, minimum capitalization, two or more shareholders, or ownership of shares by directors. It is also intended to permit a transfer of assets to certain pre-existing entities.

The second requirement allows changes of ownership that have no effect other than a redemption of less than all the shares of the corporation to reflect the case law holding that certain transactions qualify as F reorganizations even if shareholders are redeemed in the transaction. See *Reef Corp.* v. *U.S.,* 368 F.2d 125 (5th Cir. 1966) (holding that a redemption of 48 percent of the stock of a corporation that occurred during a change in place of incorporation did not cause the transaction to fail to qualify as an F reorganization); cf. *Casco Products Corp.* v. *Commissioner,* 49 T.C. 32 (1967) (holding that the surviving corporation in a merger was the continuation of the merging corporation for purposes of allowing a loss carryback, despite the forced redemption of nine percent of the stock of the merging corporation).

The third requirement (providing for the liquidation of the transferring corporation) and the fourth requirement (limiting the assets the resulting corporation may hold immediately before the transfer) reflect the statutory requirement that an F reorganization involve only one corporation. Although the proposed regulations generally require that the transferring corporation completely liquidate in the transaction, they do not require the transferring corporation to legally dissolve, thereby facilitating preservation of the value of the transferring corporation's charter. Further, to accommodate transactions in jurisdictions where it is customary to preserve pre-existing entities for future use rather than create new ones, the proposed regulations permit the retention of a nominal amount of assets for the sole purpose of preserving the transferring corporation's legal existence.

Although the proposed regulations generally require that the resulting corporation not hold any property or have any tax attributes immediately before the transfer, they do allow the resulting corporation to hold or to have held a nominal amount of assets to facilitate its organization or preserve its existence, and to have tax attributes related to these assets. In addition, to accommodate transactions involving the refinancing of debt or the leveraged redemption of shareholders, the proposed regulations provide that this requirement will not be violated if, before the transfer, the resulting corporation holds the proceeds of borrowings undertaken in connection with the transaction.

As described above, section 368(a)(1)(F) provides that an F reorganization includes a mere change in identity, form, or place of organization of one corporation, however effected. The IRS and the Treasury Department believe that the inclusion of the words "however effected" in the statutory definition of an F reorganization reflects a Congressional intent to treat as an F reorganization a series of transactions that together result in a mere change. The proposed regulations reflect this view by providing that a series of related transactions that together result in a mere change may qualify as an F reorganization.

The IRS and the Treasury Department also recognize that a reorganization qualifying under section 368(a)(1)(F)

may be a step in a larger transaction that effects more than a mere change. For example, in Revenue Ruling 96–29 (1996–1 C.B. 50), the IRS ruled that a reincorporation qualified as an F reorganization even though it was a step in a transaction in which the reincorporated entity issued common stock in a public offering and redeemed stock having a value of 40 percent of the aggregate value of its outstanding stock before the offering. In the same ruling, the IRS ruled that a reincorporation of a corporation in another state qualified as an F reorganization even though it was a step in a transaction in which the reincorporated entity acquired the business of another entity.

Consistent with Revenue Ruling 96–29, the proposed regulations provide that related events preceding or following the transaction or series of transactions that constitute a mere change do not cause that transaction or series of transactions to fail to qualify as an F reorganization. The proposed regulations further provide that the qualification of the mere change as an F reorganization does not alter the treatment of the larger transaction. For example, if a redemption of stock occurs in a transaction that qualifies as an F reorganization and the F reorganization is part of a plan that includes a subsequent merger, the step or series of steps constituting the F reorganization will not alter the tax consequences of the subsequent merger.

A number of commentators have questioned whether distributions of money or other property in an F reorganization are distributions to which section 356 applies. The IRS and the Treasury Department believe it is appropriate to treat such distributions as transactions separate from the F reorganization, even if they occur during the F reorganization. *See, e.g.*, § 1.301–1(l). Accordingly, these proposed regulations provide that if a shareholder receives money or other property (including in exchange for its shares) from the transferring or resulting corporation in a transaction that constitutes an F reorganization, the money or other property is treated as distributed by the transferring corporation immediately before the transaction. The tax treatment of such distributions is governed by sections 301 and 302, and section 356 does not apply to such distributions. The IRS and the Treasury Department believe that the same rule should apply in the context of E reorganizations. Comments are requested on whether there are some E reorganizations to which this treatment should not apply.

These regulations are proposed to be effective for transactions that occur on or after the date of these regulations are published as final regulations in the **Federal Register**.

Effect on Other Documents

Upon the issuance of these regulations as final regulations, Rev. Rul. 66–284 (1966–2 C.B. 115), Rev. Rul. 74–36 (1974–1 C.B. 85), Rev. Rul. 77–415 (1977–2 C.B. 311), Rev. Rul. 77–479 (1977–2 C.B. 119), Rev. Rul. 79–250 (1979–2 C.B. 156), Rev. Rul. 82–34 (1982–1 C.B. 59), and Rev. Rul. 96–29 (1996–1 C.B. 50), will be obsoleted.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the Service. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register.**

Drafting Information

The principal author of these proposed regulations is Robert B. Gray of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Service and Treasury Department participated in their development.

List of Subjects 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.368–1(b) is amended by adding a sentence after the third sentence to read as follows:

§ 1.368–1 Purpose and scope of exception of reorganization exchanges.

* * * * *

(b) *Purpose.* * * * Notwithstanding the previous sentence, for transactions on or after [the date these regulations are published as final regulations in the **Federal Register**], a continuity of the business enterprise and a continuity of interest are not required for a transaction to qualify as a reorganization under section 368(a)(1)(E) or (F). * * *

* * * * *

Par. 3. Section 1.368–2 is amended by:

1. Adding and reserving new paragraph (l).

2. Adding new paragraph (m).

The addition reads as follows:

§ 1.368–2 Definition of terms.

* * * * *

(l) [Reserved].

(m) *Qualification as a reorganization under section 368(a)(1)(F)*—(1) *Mere change*—(i) *In general.* To qualify as a reorganization under section 368(a)(1)(F), a transaction must result in a mere change in identity, form, or place of organization of one corporation ("mere change"). A transaction that involves an actual or deemed transfer is a mere change only if—

(A) All the stock of the resulting corporation, including stock issued before the transfer, is issued in respect of stock of the transferring corporation;

(B) There is no change in the ownership of the corporation in the transaction, except a change that has no effect other than that of a redemption of less than all the shares of the corporation;

(C) The transferring corporation completely liquidates in the transaction; and

(D) The resulting corporation does not hold any property or have any tax attributes (including those specified in

section 381(c)) immediately before the transfer.

(ii) *Exceptions and special rules*—(A) *Transferring corporation.* Legal dissolution of the transferring corporation is not required, and the mere retention of a nominal amount of assets for the sole purpose of preserving the corporation's legal existence will not disqualify the transaction as a mere change.

(B) *Resulting corporation.* A transaction will not fail to be a mere change solely because the resulting corporation, to facilitate its organization, issues a nominal amount of stock other than in respect of stock of the transferring corporation. At the time of or before the transfer, the resulting corporation may hold or have held a nominal amount of assets to facilitate its organization or preserve its existence as a corporation, and may have tax attributes related to holding such assets. Moreover, the resulting corporation may hold the proceeds of borrowings undertaken in connection with the transaction.

(2) *Non-application of continuity of interest and continuity of business enterprise requirements.* A continuity of the business enterprise and a continuity of interest are not required for a transaction to qualify as a reorganization under section 368(a)(1)(F). See § 1.368–1(b).

(3) *Related transactions*—(i) *Series of transactions.* A series of related transactions that together result in a mere change may qualify as a reorganization under section 368(a)(1)(F).

(ii) *Mere change within a larger transaction.* A reorganization under section 368(a)(1)(F) may occur within a larger transaction that effects more than a mere change. Related events that precede or follow the transaction or series of transactions that constitutes a mere change will not cause that transaction or series of transactions to fail to qualify as a reorganization under section 368(a)(1)(F). Qualification of the mere change as a reorganization under section 368(a)(1)(F) will not alter the treatment of the larger transaction.

(4) *Treatment of distributions.* If a shareholder receives money or other property (including in exchange for its shares) from the transferring or resulting corporation in a transaction that constitutes a reorganization under section 368(a)(1)(F), the money or other property is treated as distributed by the transferring corporation immediately before the transaction, and section 356(a) does not apply to such distribution. *See, e.g.*, § 1.301–1(l).

(5) *Examples.* The following examples illustrate the application of this paragraph (m). In all examples, assume that each transaction is entered into for a valid business purpose and that all corporations are domestic corporations, unless stated otherwise. The examples are as follows:

Example 1. C owns all of the stock of W, a State A corporation. The net value of W's assets and liabilities is $1,000,000. V, a State B corporation, seeks to acquire the assets of W. To effect the acquisition, V and W enter into an agreement under which V will contribute $1,000,000 to U, a newly formed corporation of which V is the sole shareholder, and W will merge into U. In the merger, C surrenders his W stock in exchange for the $1,000,000 V contributed to U. After the merger, U holds all of the assets and liabilities of W. However, the U stock is not issued in respect of the W stock as required by paragraph (m)(1)(i)(A) of this section, and the transaction results in a change in the ownership of W that has an effect other than that of a redemption of some of the W shares in violation of paragraph (m)(1)(i)(B) of this section. Therefore, the merger of W into U is not a mere change and does not qualify as a reorganization under section 368(a)(1)(F).

Example 2. A and B own 75 and 25 percent, respectively, of the stock of X, a State A corporation. The management of X determines that it would be in the best interest of X to reorganize under the laws of State B. Accordingly, X forms Y, a State B corporation, and X and Y enter into an agreement under which X will merge into Y. A does not wish to own stock in Y. In the merger, A surrenders her X stock in exchange for cash from X from X's cash reserves, and B exchanges all of his X stock for all the stock of Y. Without regard to A's surrender of her stock in X, the merger of X into Y is a mere change of X. The change in ownership caused by A's surrender of her stock in X has no effect other than that of a redemption of less than all the X shares as described in paragraph (m)(1)(i)(B) of this section. Therefore, the merger of X into Y is a mere change and qualifies as a reorganization under section 368(a)(1)(F).

Example 3. D owns all of the stock of S, a Country A corporation. The management of S determines that it would be in the best interest of S to reorganize under the laws of Country B. Under Country B law, a corporation must have at least two shareholders to enjoy limited liability. D is advised by a Country B attorney that the new corporation should issue one percent of its stock to a shareholder that is not D's nominee to assure satisfaction of the two-shareholder requirement. As part of an integrated plan, E organizes T, a Country B corporation with 1,000 shares of common stock authorized, and contributes cash to T in exchange for ten of the common shares. S then merges into T under the laws of Country A and Country B. Pursuant to the plan of merger, D surrenders his shares of stock in S in exchange for 990 shares of T common stock. Without regard to the prior issuance of T stock to E, the merger of S into T is a mere change of S. The ten shares of stock issued to E not in respect of the S stock are nominal and used to facilitate the organization of T within the meaning of paragraph (m)(1)(ii)(B) of this section. Therefore, the issuance of this stock to a new shareholder does not cause the merger of S into T to fail to be a mere change. Accordingly, the merger is a reorganization under section 368(a)(1)(F).

Example 4. A owns all of the stock of H, a corporation that owns all of the stock of S, a corporation engaged in a manufacturing business. H has owned the stock of S for many years. H owns no assets other than the stock of S. A decides to eliminate the holding company structure by merging H into S. Because it operates a manufacturing business, the resulting corporation, S, holds property and has tax attributes immediately before the transfer. Therefore, under paragraph (m)(1)(i)(D) of this section, the merger of H into S is not a mere change and does not qualify as a reorganization under section 368(a)(1)(F). The same result would occur if, instead of H merging into S, S merged into H.

Example 5. Corporation P owns all of the stock of S1, a State X corporation. The management of P determines that it would be in the best interest of S1 to change its place of incorporation to State Y. Accordingly, under an integrated plan, P forms S2, a new State Y corporation, P contributes the S1 stock to S2, and S1 merges into S2 under the laws of State X and State Y. Under paragraph (m)(3)(i) of this section, a series of transactions that together result in a mere change of one corporation may qualify as a reorganization under section 368(a)(1)(F). The contribution of S1 stock to S2 and the merger of S1 into S2 together constitute a mere change of S1. Therefore, the transaction qualifies as a reorganization under section 368(a)(1)(F). S1 is treated as transferring its assets to S2 in exchange for the S2 stock and distributing the S2 stock to P in exchange for P's S1 stock.

Example 6. Corporation P owns all of the stock of S, a State X corporation. The management of P determines that it would be in the best interest of S to change its place of incorporation to State Y. Accordingly, P forms New S, a State Y corporation. S then merges into New S under the laws of State X and State Y. As part of the same plan, P sells all of its stock in New S to an unrelated party. Without regard to the sale of New S stock, the merger of S into New S is a mere change within the meaning of paragraph (m)(1) of this section. Under paragraph (m)(3)(ii) of this section, related events that precede or follow the transaction or series of transactions that constitute a mere change do not cause that transaction to fail to qualify as a reorganization under section 368(a)(1)(F). Therefore, the sale of the New S stock is disregarded in determining whether the merger of S into New S is a mere change. Accordingly, the merger of S into New S is a reorganization under section 368(a)(1)(F).

Example 7. A owns all of the stock of T and none of the stock of P. P owns all of the stock of S. T and S are State M corporations engaged in manufacturing businesses. The following transactions occur pursuant to a single plan. First, T merges into S with A receiving solely stock in P. Second, P

changes its state of incorporation to State N by merging into newly organized New P under the laws of State M and State N. Third, P redeems all the stock issued to A in respect of his T stock for cash. Without regard to the other steps, the merger of T into S qualifies as a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(D). Without regard to the other steps, the merger of P into New P qualifies as a reorganization under section 368(a)(1)(F). Under paragraph (m)(3)(ii) of this section, related events that precede or follow the transaction or series of transactions that constitute a mere change do not cause that transaction to fail to qualify as a reorganization under section 368(a)(1)(F). Therefore, the merger of P into New P qualifies as a reorganization under section 368(a)(1)(F). However, under paragraph (m)(3)(ii) of this section, the qualification of the merger of P into New P as a reorganization under section 368(a)(1)(F) does not alter the tax treatment of the merger of T into S. Because the P shares received by A in respect of the T shares are redeemed for cash pursuant to the plan, the merger of T into S does not satisfy the continuity of interest requirement and does not qualify as a reorganization under section 368(a)(1)(A).

Example 8. Corporation P owns all of the stock of S, a State A corporation. The management of P determines that it would be in the best interest of S to change its form from a State A corporation to a State A limited partnership. Accordingly, P contributes one percent of the S stock to newly formed LLC, a limited liability company, in exchange for all of the membership interests in LLC. Under § 301.7701–3 of this chapter, LLC is disregarded as an entity separate from its owner, P. Under a State A statute, S converts to a State A limited partnership. In the conversion, P's interest as a 99 percent shareholder of S is converted into a 99 percent limited partner interest, and LLC's interest as a one percent shareholder of S is converted into a one percent general partner interest. S then elects, under § 301.7701–3(c), to be classified as a corporation for federal income tax purposes, effective on the date of the conversion. The conversion of S from a State A corporation to a State A limited partnership, together with the election to treat S as a corporation for federal tax purposes, constitutes a mere change and is a reorganization under section 368(a)(1)(F).

(6) *Effective Date.* This paragraph (m) applies to transactions occurring on or after [the date these regulations are published as final regulations in the **Federal Register**].

Linda M. Kroening,

Acting Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–18476 Filed 8–11–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–124872–04]

RIN 1545–BD37

Clarification of Definitions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: This issue of the **Federal Register** contains temporary regulations that provide clarification of the definitions of a corporation and a domestic entity in circumstances where the business entity is considered to be created or organized in more than one jurisdiction. These regulations will affect business entities that are created or organized under the laws of more than one jurisdiction. The text of those temporary regulations also serves as the text of these proposed regulations. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments and must be received by November 10, 2004. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for November 3, 2004 must be received by October 15, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–124872–04), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday (excluding Federal holidays) between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–124872–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC or sent electronically, via either the IRS internet site at *www.irs.gov/regs* or the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS and REG–124872–04). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Thomas Beem, (202) 622–3860; concerning submissions of comments or the public hearing, Sonya Cruse, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the **Federal Register** amend 26 CFR part 301 relating to section 7701 of the Internal Revenue Code of 1986 (Code). The temporary regulations provide guidance as to the definitions of a corporation and of domestic and foreign entities in circumstances in which an entity is created or organized under the laws of more than one jurisdiction (a dually chartered entity). The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains both the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7806(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for November 3, 2004 at 10 a.m. in the Auditorium of the Internal Revenue building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area earlier than 30 minutes prior to the start of the hearing. For information about having your name placed on the building access list to

attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to this hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments and an outline of the topics to be discussed and the time devoted to each topic (signed original and eight (8) copies) by October 15, 2004. A period of ten minutes will be allotted to each person for making comments. An agenda showing the scheduling of speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Proposed Effective Date

The regulations proposed in this document would apply on August 12, 2004 to all business entities existing on or after that date.

Drafting Information

The principal author of these proposed regulations is Thomas Beem of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and Recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 301.7701–1, paragraph (d) is revised to read as follows:

§ 301.7701–1 Classification of organizations for federal tax purposes.

* * * * *

(d) [The text of the proposed amendment revising § 301.7701–1(d) is the same as the text of § 301.7701–1T(d) published elsewhere in this issue of the **Federal Register**.]

* * * * *

Par. 3. In § 301.7701–2 paragraph (b)(9) is added to read as follows:

§ 301.7701–2 Business entities; definitions.

* * * * *

(b) * * *

(9) [The text of the proposed amendment adding § 301.7701–2(b)(9) is the same as the text of § 301.7701–2T(b)(9) published elsewhere in this issue of the **Federal Register**.]

* * * * *

Par. 4. Section 301.7701–5 is revised to read as follows:

§ 301.7701–5 Domestic and foreign business entities.

[The text of the proposed amendment revising § 301.7701–5 is the same as the text of § 301.7701–5T published elsewhere in this issue of the **Federal Register**.]

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–18481 Filed 8–11–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AD26

Apostle Islands National Lakeshore; Designation of Snowmobile and Off-road Motor Vehicle Routes, and Use of Portable Ice Augers or Power Engines

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service (NPS) is proposing to designate areas and routes on Lake Superior and the mainland unit for use by snowmobiles, off-road motor vehicles, and ice augers or power engines within Apostle Islands National Lakeshore. The existing regulations prohibit such use unless routes, areas and water surfaces are specifically identified and promulgated as special regulations. Unless otherwise provided for by special regulation, the operation of snowmobiles and off-road motor vehicles within areas of the National Park System is prohibited under existing regulations. The intended effect of the special regulations is to designate the routes, areas and frozen water surfaces identified herein and remove the requirement for a permit to operate an ice auger or power engine. All other portions of the existing regulation, governing use, safety, and operating requirements would remain in effect.

DATES: Written comments will be accepted through October 12, 2004.

ADDRESSES: Comments should be addressed to: Superintendent, Apostle Islands National Lakeshore, Route 1, Box 4, Bayfield, Wisconsin 54814. Comments may also be submitted electronically to: *APIS_Winter_Use@nps.gov.*

FOR FURTHER INFORMATION CONTACT: Gregory F. Zeman, Chief of Protection, Apostle Islands National Lakeshore, Route 1, Box 4, Bayfield, Wisconsin 54814. Telephone: (715) 779–3398, extension 201.

SUPPLEMENTARY INFORMATION:

Background

The enabling legislation for Apostle Islands National Lakeshore (PL–424, enacted September 26, 1970) specifically authorized recreational use of the lakeshore by the public. It further included provisions for hunting, fishing, and trapping on the lands and waters within the boundaries, with certain limitations allowed for public safety administration, fish or wildlife management, or public use and enjoyment.

The lakeshore comprises 21 islands and a 12-mile strip of mainland shoreline lying at the northern end of the Bayfield peninsula in Northern Wisconsin. Jurisdiction extends for a distance of one-quarter mile offshore on the waters of Lake Superior surrounding each island and along the mainland coast. During the winter months, safe access up to shoreline areas and traditional hunting, fishing, and trapping areas frequently requires over ice travel by snowmobile and various forms of off-road motor vehicle transportation within the quarter-mile jurisdiction.

The Federal legislation that established the Lakeshore in 1970 includes the water areas of Lake Superior that surround every island and extend seaward from the mainland shoreline for a distance of one-quarter mile.

The use of snowmobiles, off-road motor vehicles, and ice augers or power engines was common prior to the establishment of the lakeshore and for a number of years following it. The use of ice augers or power engines is necessary to provide access to the water through the ice for authorized fishing activities. Ice augers are typically operated only once a day at the beginning of ice fishing activities. The length of operation is chiefly dependent on the thickness of the ice, which can vary from four inches to more than three feet. Most ice augers can cut through the ice surface in less than a few minutes. The exclusive purpose of operation is to cut or bore small holes in the frozen surface

of Lake Superior to allow fishing equipment to pass freely.

These uses continue as a safe, common, and necessary method of access up to shorelines and other locations inside lakeshore boundaries and corridors to areas outside the lakeshore boundaries for gaining access to fishing areas during winter. The designation of routes and water surfaces will provide the public with the means to safely navigate around rough ice, cracks, pressure ridges and other dangerous ice conditions on frozen Lake Superior. It will facilitate traditional and legislatively authorized uses such as hunting, fishing and trapping while also providing shoreline access for winter camping, hiking, snowshoeing, skiing, and other non-motorized recreational activities within the lakeshore.

Under current NPS regulations, 36 CFR 2.18 and 36 CFR 4.10, the use of snowmobiles and off-road motor vehicles within areas of the National Park System is prohibited, except on designated routes and water surfaces that are used by motor vehicles or motorboats during other seasons. These routes and water surfaces must be designated and must be promulgated as special regulations. The use of portable engines associated with a power ice auger is allowed by permit only under 36 CFR 2.12(a)(3).

National Park Service Management Policies Section 8.2.2.1 states that any restriction of appropriate recreational uses will be limited to what is necessary to protect park resources and values, to promote visitor safety and enjoyment, or to meet park management needs. It also states the Superintendent will develop and implement visitor use management plans and take management actions, as appropriate, to ensure that recreational uses and activities within the park are consistent with authorizing legislation and do not cause unacceptable impacts to park resources or values.

After reviewing the issues surrounding the use of snowmobiles, off-road motor vehicles, and ice augers or power engines, NPS has determined that the uses authorized in this rule are consistent with the enabling legislation and will not result in a derogation of resources, values, or purposes for which the lakeshore was established. Snowmobiles and off-road motor vehicles are used as a means of transportation to a specific park location, where the user participates in a non-motorized recreational activity. When the snowmobile/off-road motor vehicle user reaches their destination, the snowmobile or off-road motor vehicle is stopped with the engine off, minimizing noise, pollution, and other associated impacts. By contrast, recreational touring, which is not allowed under this rule, would involve continuous or prolonged operation of a snowmobile or off-road motor vehicle which would increase noise, pollution, and other associated impacts.

The designation of areas and routes on the frozen surface of Lake Superior and mainland road is consistent with areas and routes used by powerboats and motor vehicles during other times of year. These proposed regulations limit the designation of specific routes, and further restrict designation of routes to surfaces used by motor vehicles during other times of year. Because of these proposed limitations, no additional snowmobile or off-road motor vehicle routes will be established and access to hunting, fishing, trapping areas, and non-motorized recreational opportunities will continue to be pursued through hiking, skiing, and snowshoeing activities in accordance with Federal and State regulations. Operation of power engines in other areas or for other purposes will continue to be subject to authorization by permit only.

Less than 15 percent of the ice on Lake Superior that surrounds the islands is located within the lakeshore's ¼-mile boundary. Exterior areas are owned by the State of Wisconsin and allow snowmobile and off-road motor vehicle operation pursuant to State regulations. With virtually unlimited snowmobile and off-road motor vehicle use in State areas, which are directly adjacent to park boundaries, the most significant factor for noise and emissions in island and mainland locations inside the lakeshore boundary is wind speed and direction rather than where snowmobiles and off-road motor vehicles are operated. Sound and emissions can travel long distances over the hard frozen surface of Lake Superior.

The conditions that allow for reasonably safe snowmobile and off-road motor vehicle access on the frozen surface of Lake Superior are generally limited to late December through mid-March. During this time period, a majority of the wildlife has either migrated from the area or is in hibernation. The disruptive noise of snowmobiles, off-road motor vehicles, and ice augers or power engines is not expected to exceed the level generated by motor boats during the summer visitation season. Since snowmobiles and off-road motor vehicles are not permitted to operate outside of designated roads on the mainland or on the islands themselves, no impact is expected on the wintering white-tailed deer population, other wildlife, or the snow-covered vegetation. Therefore, it is anticipated that adoption of this regulation will not adversely affect the resources of the lakeshore.

Allowing the use of snowmobiles, off-road motor vehicles, and ice augers or power engines on the frozen surface of Lake Superior is not expected to dramatically increase visitation to the area. Traditional users include fishermen and recreational users that engage in winter hunting, trapping, camping, hiking, snowshoeing, skiing, and other non-motorized recreational activities.

Designated state and county trails for snowmobile and off-road motor vehicle use are abundant throughout Ashland and Bayfield Counties. Bayfield County contains more than 430 miles of maintained snowmobile trail and in excess of 108 miles of all-terrain vehicle routes. Ashland County has more than 205 miles and 132 miles, respectively. There is little demand for recreational touring on the inherently dangerous ice of Lake Superior.

Due to the short duration of accessibility, instability of the ice in all but the most severe of winters, and limited need for access to non-NPS property outside the lakeshore boundary, it is not anticipated that a large increase in snowmobiles, off-road motor vehicles, or commercial operations will result from adopting these special regulations. With current use limited and no significant increase expected, no measurable economic impact is anticipated.

The NPS considers that local residents, area businesses, and park visitors are best served by allowing for the use of snowmobiles, off-road motor vehicles, and portable ice augers/engines in the designated areas and routes to provide legal access for hunting, fishing, trapping, and non-motorized recreational activities.

Compliance With Other Laws

Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and has not been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Snowmobiles and off-road motor vehicles (all terrain vehicles) are not

available for sale, rental, or lease through local businesses or tour companies within the Apostle Islands (Chequamegon Bay) area. Snowmobiles and off-road motor vehicles are almost exclusively privately owned or transported to the region from sources outside of the local geographic area.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Actions taken under this rule will not interfere with other agencies or local government plans, policies or controls. This rule is an agency specific rule.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule will have no effects on entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No grants or other forms of monetary supplements are involved.

(4) This rule does not raise novel legal or policy issues. This rule codifies long-existing uses at Apostle Islands National Lakeshore and is not expected to be controversial.

Regulatory Flexibility Act

The Department of the Interior certifies that this rulemaking will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Snowmobiles and off-road motor vehicles (all terrain vehicles) are not available for sale, rental, or lease through local businesses or tour companies within the Apostle Islands (Chequamegon Bay) area. Snowmobiles and off-road motor vehicles are almost exclusively privately owned or transported to the region from sources outside of the local geographic area.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. This rule is an agency specific rule and does not impose any other requirements on other agencies, governments, or the private sector.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. A taking implication assessment is not required. No taking of personal property will occur as a result of this rule.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. This proposed rule only affects use of NPS administered lands and waters.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This regulation does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB Form 83–I is not required.

National Environmental Policy Act

The National Park Service has analyzed this rule in accordance with the criteria of the National Environmental Policy Act. The NPS has determined that this proposed rulemaking will not have a significant effect on the quality of the human environment, health, and safety because it is not expected to:

(a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

(b) Introduce incompatible uses which might compromise the nature and characteristics of the area, or cause physical damage to it;

(c) Conflict with adjacent ownerships, or land uses; or

(d) Cause a nuisance to adjacent owners, or occupants.

Based on this determination, this rulemaking is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental guidelines in 516 DM 6 (49 FR 21438). As such, neither an Environmental Assessment nor an Environmental Impact Statement has been prepared. A categorical exclusion has been documented and is on file with the park headquarters.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2 have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects. Park staff consulted with the Red Cliff Band of Lake Superior Chippewa and the Great Lakes Indian Fish and Wildlife Commission. In return the park received a letter generally supporting the proposed regulations from the Red Cliff Band and verbal support from the Fish and Wildlife Commission.

Clarity of Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to read if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "§" and a numbered heading; for example § 7.82 Apostle Islands National Lakeshore. (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e–mail the comments to this address: *Exsec@ios.doi.gov.*

Drafting Information

The primary authors of this rulemaking are Robert J. Krumenaker, Superintendent, James A. Nepstad, Chief of Planning and Resource Management, and Gregory F. Zeman, Chief of Protection, Apostle Islands National Lakeshore.

Public Participation

If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to the Superintendent, Apostle Islands National Lakeshore, Route 1, Box 4, Bayfield, Wisconsin 54814. You may also comment via the Internet to *APIS_Winter_Use@nps.gov*. Please also include "Winter Use Rule" in the subject line and your name and return address in the body of your Internet message. Finally, you may hand deliver comments to the Superintendent, Apostle Islands National Lakeshore, 415 Washington Avenue, Bayfield, Wisconsin.

Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, available for public inspection in their entirety.

List of Subjects in 36 CFR Part 7

National Parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 7 as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for part 7 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8–137 (1981) and D.C. Code 40–721 (1981).

2. Section 7.82 is amended by designating the existing text as paragraph (a) and adding paragraphs (b), (c), and (d) to read as follows:

§ 7.82 Apostle Islands National Lakeshore.

* * * * *

(b) *Snowmobiles.* (1) Snowmobiles may be operated in the following designated areas within the Lakeshore:

(i) The frozen surface of Lake Superior that surrounds every island from the shoreline to the authorized boundary.

(ii) The frozen surface of Lake Superior from Sand Point to the mainland unit's eastern boundary.

(iii) The ¼ mile section of the Big Sand Bay Road that passes through the park mainland unit to non-NPS property.

(2) Snowmobile use is authorized for the purpose of providing access for legal forms of:

(i) Ice fishing.

(ii) Hunting and trapping.

(iii) Winter camping.

(iv) Other non-motorized recreational activities.

(v) Access to non-NPS property by owners, and use and occupancy properties by lessees and their representatives or guests.

(3) Snowmobiles may be used for administrative, law enforcement, and emergency services as determined by the Superintendent.

(4) Snowmobile use in areas and for purposes other than those stated in paragraphs (b)(1) and (b)(2) of this section is prohibited.

(5) Maps showing designated use areas are available at park headquarters.

(c) *Off-road vehicles.* (1) Off-road motor vehicles may be operated in the following designated areas within the Lakeshore:

(i) The frozen surface of Lake Superior that surrounds every island from the shoreline to the authorized boundary.

(ii) The frozen surface of Lake Superior from Sand Point to the mainland unit's eastern boundary.

(2) Off-road motor vehicle use is authorized for the purpose of providing access for legal forms of:

(i) Ice fishing.

(ii) Hunting and trapping.

(iii) Winter camping.

(iv) Other non-motorized recreational activities.

(v) Access to private property by owners, and use and occupancy properties by lessees and their representatives or guests.

(3) Off-road motor vehicles may be used for administrative, law enforcement, and emergency services as determined by the Superintendent.

(4) Off-road motor vehicle use in areas and for purposes other than those stated in paragraphs (c)(1) and (c)(2) of this section is prohibited.

(5) Maps showing designated use areas are available at park headquarters.

(d) *Ice augers and power engines.* (1) *Ice auger* means a portable gasoline or electric powered engine connected to a rotating helical shaft for boring through the frozen surface of a lake.

(2) *Power engine* means a mobile gasoline or electric powered engine or device that is connected to a rotating saw blade or teeth linked in an endless chain for cutting through the frozen ice surface of a lake.

(3) Notwithstanding the requirements of 36 CFR 2.12(a)(3), operation of an ice auger or power engine is authorized on designated portions of Lake Superior for the specific purpose of cutting through the ice surface to provide access for legal ice fishing activity.

(4) Areas designated for use of an ice auger or power engine include:

(i) The frozen surface of Lake Superior that surrounds every island from the shoreline to the authorized boundary.

(ii) The frozen surface of Lake Superior from Sand Point to the mainland unit's eastern boundary.

(5) Maps showing designated use areas shall be available at park headquarters.

(6) Use of an ice auger or power engine on any land surface or frozen water surface outside of designated use areas is prohibited without a permit.

Dated: August 4, 2004.

Paul Hoffman,

Deputy Assistant Secretary for Fish And Wildlife and Parks.

[FR Doc. 04–18429 Filed 8–11–04; 8:45 am]

BILLING CODE 4312–97–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 66

[USCG–1998–3798]

RIN 1625–AA14

Numbering of Undocumented Barges

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: The Coast Guard is reopening the comment period on its notice of proposed rulemaking on numbering of undocumented barges, published in the **Federal Register** on January 11, 2001 (66 FR 2385). Reopening the comment period gives the public more time to submit comments and recommendations on the issues raised in the proposed rule. This rulemaking is necessary to establish a statutorily required numbering system for undocumented barges more than 100 gross tons

operating on the navigable waters of the United States.

DATES: Comments and related material must reach the Docket Management Facility on or before November 10, 2004.

ADDRESSES: To make sure that your comments and related material are not entered more than once in the docket, please submit them by only one of the following means:

(1) By mail to the Docket Management Facility (USCG–1998–3798), U.S. Department of Transportation, room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001.

(2) By delivery to room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(3) By fax to the Docket Management Facility at 202–493–2251.

(4) Electronically through the Web site for the Docket Management System at *http://dms.dot.gov.*

You must also mail comments on collection of information to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

The Docket Management Facility maintains the public docket for the rulemaking. Comments and material received from the public will become part of this docket and will be available for inspection or copying at room PL–401, located on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Ms. Pat Williams, Project Manager, National Vessel Documentation Center, Coast Guard, telephone 304–271–2400, e-mail: *pwilliams@comdt.uscg.mil.* If you have questions on viewing the docket, call Ms. Andrea M. Jenkins, Program Manager, Docket Operations, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this Coast Guard rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (USCG–1998–3798), indicate the specific section of the Notice of Proposed Rulemaking to which each comment applies, and give the reason for each comment. You may submit your comments and material by mail, hand delivery, fax, or electronic means to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

Your comments and materials may influence this rulemaking. We will consider all comments received during the comment period.

Regulatory History

On October 18, 1994, the Coast Guard published a notice in the **Federal Register** (59 FR 52646) requesting comments on issues related to a numbering system for undocumented barges measuring more than 100 gross tons. The primary issues addressed in the notice concerned who should administer a barge numbering system, what type of number should be required, and how much the numbering system would cost. The Coast Guard received twenty-one comments in response to the notice.

On July 6, 1998, the Coast Guard published an Advanced Notice of Proposed Rulemaking (ANPRM) in the **Federal Register** (63 FR 36384), discussing the proposed regulation, comments received from the October 1994 notice, and a preliminary regulatory assessment.

On January 11, 2001, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (66 FR 2385), discussing the proposed regulation, comments received from the ANPRM, and requesting additional comments.

The comments received from the NPRM (*see* this docket on the Internet at *http://dms.dot.gov*) will be discussed in the final rule, along with comments received from this notice.

Background and Purpose

Congress passed the Abandoned Barge Act of 1992 (Public Law 102–587, §§ 5301–05) ("the Act"). During passage of the Act, Congress noted that abandoned barges are often used for the illegal disposal of hazardous cargo, waste, and petroleum products. This illegal disposal can lead to actual or potential pollution incidents. To prevent these incidents, the Act added a new chapter 47 to title 46 of the United States Code that prohibits abandoning barges in the navigable waters of the United States. The Act also amended 46 U.S.C. 12301 to require the numbering of undocumented barges measuring more than 100 gross tons operating on the navigable waters of the United States.

This numbering system will provide a means for identifying parties responsible for the now illegal abandonment of barges. More importantly, it will help identify those parties who may be held liable for the removal and proper disposal of any hazardous substances stored or deposited on board abandoned barges, as well as for the removal of the barges from the nation's waterways. This potential for liability would serve as a deterrent to barge abandonment.

Taking into consideration the time since the publication of the NPRM, the Coast Guard is soliciting more public information before a final rule is published.

Public Meeting

The Coast Guard plans no public meeting. You may request a public meeting by submitting a comment requesting one to the address under **ADDRESSES.** The request should include the reasons why a meeting would be beneficial. If the Coast Guard determines that a meeting should be held, we will announce the time and place in a later notice in the **Federal Register.**

Dated: August 6, 2004.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security & Environmental Protection.

[FR Doc. 04–18471 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–15–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1835 and 1852

RIN 2700–AD04

Final Scientific and Technical Reports—SBIR and STTR Contracts

AGENCY: National Aeronautics and Space Administration.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the NASA FAR Supplement(NFS) by adding an Alternate III to the "Final Scientific andTechnical Reports" clause for use in contracts awarded under the Small Business Innovation Research

(SBIR) and the Small BusinessTechnology Transfer (STTR) programs. This change is required to recognize the "Rights in Data—SBIR Programs" clause rather than the FAR "Rights in Data—General" clause currently referenced in the NFS "Final Scientific and Technical Reports" clause.

DATES: Comments should be submitted on or before October 12, 2004, to be considered in formulation of the final rule.

ADDRESSES: Interested parties may submit comments, identified by RIN number 2700–AD04 via the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments. Comments may also be submitted to Celeste Dalton, NASA, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546. Comments can also be submitted by e-mail to: *Celeste.M.Dalton@nasa.gov*.

FOR FURTHER INFORMATION CONTACT: Celeste Dalton, NASA, Office of Procurement, Contract Management Division (Code HK); (202) 358–1645; e-mail: *Celeste.M.Dalton@nasa.gov*.

SUPPLEMENTARY INFORMATION:

A. Background

The NASA FAR Supplement at 1835.070(d) requires all research and development contracts to include the clause at 1852.235–73, FinalScientific and Technical Reports. SBIR and STTR contracts are considered R&D contracts and must include the clause at 1852.235–73. This clause provides direction to the contractor regarding its ability to release data first produced or used in performance of the contract. However, the clause currently only address the contractor's rights in data as defined in FAR 52.227–14, Rights in Data—General. Contractor rights in data under SBIR and STTR contracts are defined in FAR clause 52.227–20, Rights in Data—SBIR Program. This change proposes an Alternate III to 1852.235–73 for use in SBIR and STTR contracts. The proposed Alternate III references FAR 52.227–20 to recognize contractor data rights under SBIR and STTR contracts.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This proposed rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities with the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601. *et seq.*, because it only clarifies what the appropriate data rights clause is used under SBIR and STTR contracts.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes do not impose recordkeeping or information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR 1835 and 1852

Government Procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

Accordingly, 48 CFR Parts 1835 and 1852 are amended as follows:

1. The authority citation for 48 CFR Parts 1835 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1835—RESEARCH AND DEVELOPMENT CONTRACTING

2. Amend section 1835.070 by adding paragraph (d)(3) to read as follows:

1835.070 NASA contract clauses and solicitation provision.

* * * * *

(d) * * *

(3) Except when Alternate II applies in accordance with paragraph (d)(2) of this section, the contracting officer shall insert the clause with its Alternate III in all SBIR and STTR contracts.

* * * * *

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 1852.235–73 by revising the date of the clause to read (XX/XX); in the first sentence of paragraph (b), removing "NPG" and adding "NPR" in its place; and adding Alternate III to read as follows:

1852.235–73 Final Scientific and Technical Reports.

* * * * *

ALTERNATE III

(XX/XX)

As prescribed by 1835.070(d)(3), insert the following as paragraph (e) of the basic clause:

(e) The Contractor's rights in data are defined in FAR 52.227–20, Rights In Data—SBIR Program. The Contractor may publish, or otherwise disseminate, such data without prior review by NASA. The Contractor is responsible for reviewing publication or dissemination of the data for conformance with laws and regulations governing its distribution, including intellectual property rights, export control, national security and other requirements, and to the extent the Contractor receives or is given access to data necessary for the performance of the contract which contain restrictive markings, for complying with such restrictive markings. In the event the Contractor has established its claim to copyright data produced under this contract and has affixed a copyright notice and acknowledgement of Government sponsorship, or has affixed the SBIR Rights Notice contained in paragraph (d) of FAR 52.227–20, the Government shall comply with such Notices.

[FR Doc. 04–18365 Filed 8–11–04; 8:45 am]

BILLING CODE 7510–01–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173, 178, 179 and 180

[Docket No. RSPA–04–18683 (HM–218C)]

RIN 2137–AD87

Hazardous Materials; Miscellaneous Amendments

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: RSPA proposes to make miscellaneous amendments to the Hazardous Materials Regulations based on petitions for rulemaking and RSPA initiatives. These proposed amendments are intended to update, clarify or provide relief from certain regulatory requirements.

DATES: Comments must be received by October 12, 2004.

ADDRESSES: You may submit comments (identified by DOT DMS Docket Number RSPA–04–18683 (HM–218C)) by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.

Fax: 202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, PL–401, Washington, DC 20590–0001.

Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the

online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted, without change, to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act heading under Regulatory Analyses and Notices.

Docket: For access to the docket to read background documents and comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Gigi Corbin, Office of Hazardous Materials Standards, (202) 366–8553, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

This NPRM is designed primarily to reduce regulatory burdens on industry by incorporating changes into the Hazardous Materials Regulations (HMR) based on RSPA's own initiatives and petitions for rulemaking submitted in accordance with 49 CFR 106.95. In a continuing effort to review the HMR for necessary revisions, RSPA ("we" and "us") is also proposing to eliminate, revise, clarify and relax certain other regulatory requirements.

II. Public Participation

Comments should identify the docket number (RSPA–04–18683) and, if sent by mail, comments are to be submitted in duplicate. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped postcard. Internet users may access all comments received by the Department of Transportation at *http://dms.dot.gov.*

The following is a section-by-section summary of the proposed changes.

Section-by-Section Review

Part 171

Section 171.7

Based on a petition for rulemaking by the Organic Peroxide Producers Safety Division (OPPSD) (P–1429), we are proposing to incorporate by reference a document entitled "An Example of a Test Method for Vent Sizing—OPPSD/SPI Methodology" published in the American Institute of Chemical Engineers, Process Safety Progress Journal, June 2002, issue (Vol. 21, No. 2). The document describes an alternative method to determine the size of emergency relief devices on portable tanks transporting organic peroxides.

We are proposing to remove the American Society for Testing and Materials ASTM A 607–98 "Standard Specification for Steel, Sheet and Strip, High-Strength, Low-Alloy, Columbium or Vanadium, or Both, Hot-Rolled and Cold-Rolled." We are proposing to incorporate by reference the ASTM A 1008/A 1008M–3 "Standard Specification for Steel, Sheet, Cold-Rolled, Carbon, Structural, High-Strength Low-Alloy and High Strength Low-Alloy with Improved Formability" and A 1011/A 1011M–03a "Standard Specification for Steel, Sheet and Strip, Hot-Rolled, Carbon, Structural, High-Strength Low-Alloy and High Strength Low-Alloy with Improved Formability." In 2000, ASTM A 607–98 was replaced by ASTM A 1008/A 1008M–03 and A 1011/A 1011M–03a.

We are also proposing to incorporate by reference the Department of Defense's (DOD) "Packaging of Hazardous Material, DLAD 4145.41/AR 700–143/ AFJI 24–210/NAVSUPINST 4030.55B/ MCO 4030.40B". *See* § 173.7 preamble discussion.

Also, we are proposing to update the following documents which are incorporated by reference:

—Chlorine Institute instruction booklets entitled "Chlorine Institute Emergency Kit 'A' for 100-lb. & 150-lb. Chlorine Cylinders" (2000 edition) and "Chlorine Institute Emergency Kit 'B' for Chlorine Ton Containers" (1996 edition) to the 2003 edition; and

—Transport Canada Transportation of Dangerous Goods Regulations from the July 1985 edition to the August 2001 edition.

In paragraph (b), we are proposing to remove the table entry "National Association of Corrosive Engineers (NACE)" and NACE Standard TM090969 which describes an acceptable test for a liquid corrosive material. We failed to remove this entry when we revised the definition and testing methods for corrosive materials in a previous rulemaking.

Section 171.8

We are proposing to revise the definition for "Materials of trade" (MOTS) by removing the phrase "in direct support of a principal business that is other than transportation by motor vehicle." This amendment will clarify that hazardous materials being transported for private carriage may be transported under the MOTS exception, if qualified, regardless of the principal business of the carrier.

Section 171.12a

In paragraph (b)(2), we propose to clarify that certain exceptions in Transport Canada's Transportation of Dangerous Goods (TDG) Regulations are not recognized under the reciprocity provisions; specifically, materials subject to the 500 kg exception in paragraph 1.16 of the TDG Regulations, may not be transported under the provisions of § 171.12a and are subject to the requirements of the HMR.

Section 171.14

Currently paragraph (d)(3) authorizes use of the KEEP AWAY FROM FOOD label and placard in effect on September 30, 1999, until October 1, 2003. Since the transition period has expired, we are proposing to remove paragraph (d)(3).

Part 172

Section 172.101

Currently, use of specification 3T cylinders, which are bulk packagings, is authorized in the non-bulk packaging sections in column (8B) of the Hazardous Materials Table (HMT). We are proposing to add a statement in § 172.101(i)(3) and a new paragraph (i)(5) to clarify that some bulk packaging authorizations are found in column (8B) of the HMT and in special provisions in column (7).

In the current HMT, "Bromine" and "Bromine solutions" are combined into one entry. The entry has a "+" in column (1) which fixes the proper shipping name, hazard class, ID number and packing group. Bromine and bromine solutions are assigned to Class 8 (corrosive) and have a subsidiary poison inhalation hazard in Zone A. It has been brought to our attention that some bromine solutions do not meet the criteria for a PIH Zone A material and are, in fact, in Hazard Zone B. Under the current regulations, a bromine solution meeting the criteria for a PIH Zone B material must be packaged and offered for transportation in the same manner as a bromine solution meeting the criteria for a PIH Zone A material. We are proposing to revise the HMT by adding two new entries, one for bromine solution, PIH Zone A and one for bromine solution, PIH Zone B. In the new table entries, we are proposing to

delete special provisions A3 and A6 in column (7) since bromine and bromine solutions are forbidden for transportation by air. Additionally, for each entry we are proposing to add missing stowage category "D" for vessel transportation in column 10A of the HMT. Stowage category "D" is described in § 172.101(k)(4).

In a final rule published on June 21, 2001 (HM–215D; 66 FR 33337), we removed the domestic entry "Denatured Alcohol, NA 1987" based on our determination that the entry "Alcohols, n.o.s., UN 1987" was equally appropriate. The Renewable Fuels Association (RFA) petitioned RSPA (P–1430) to reinstate the entry "Denatured Alcohol, NA 1987." The petitioner states that based on the flashpoint of the material, some ethanol shippers are using the shipping description "Flammable liquid, n.o.s., UN 1993" rather than "Alcohol, n.o.s., UN 1987." The RFA expressed concern for the safety of emergency responders. The Emergency Response Guidebook (ERG) directs emergency responders to Guide 128 for ID number 1993, and recommends "regular foam" to fight large fires. Guide 127 for ID number 1987 recommends "alcohol-resistant foam." The RFA states that the entry "Denatured Alcohol, NA 1987" which corresponds to Guide 127 in the ERG is the more appropriate shipping description. Based on the petition, we are proposing to reinstate the entry. We are also proposing to add the new special provision for the entries "Denatured Alcohol, NA 1987" and "Alcohols, n.o.s., UN 1987" to allow solutions of alcohol and petroleum products be described as either "Denatured Alcohol" or "Alcohols, n.o.s." provided the solution contains no more than 5% petroleum products.

We are proposing to correct an error in columns (9A) and (9B) for the entries "sec-Butyl chloroformate, NA 2742" and "Isobutyl chloroformate, NA 2742." The current HMT reflects these material may be transported by air. These materials are poisonous by inhalation in Hazard Zone B and are forbidden on passenger and cargo only aircraft.

We are proposing to revise the entry for "Refrigerating machines, *containing flammable, non-toxic, liquefied gas*, UN 3358" by adding a reference to § 173.307 in column (8A) of the HMT. Section 173.307 excepts refrigerating machines containing 12 kg (25 pounds) or less of a flammable, non-toxic gas from the HMR, except when offered or transported by air or vessel. We are also proposing to correct inconsistencies with the International Maritime Dangerous Goods (IMDG) Code pertaining to vessel stowage for this entry.

We are proposing to revise the entry for "1,3,5-Trimethylbenzene, UN 2325" by adding a limited quantity exception for flammable liquids (*see* § 173.150) in Column (8A) of the HMT. This revision would be consistent with entries for other PG III flammable liquids in the HMR and in international regulations.

Section 172.102

We are proposing to revise Special provision 53 to provide relief from the subsidiary hazard class/division entry on the shipping paper if the material is excepted from the subsidiary label requirements.

Section 172.203

For readers' convenience, we are proposing to add a new paragraph (l)(4) which cross-references § 171.4. Section 171.4 excepts marine pollutants in non-bulk packagings from the HMR, except when transported by vessel.

Section 172.205

Section 172.205 prescribes shipping paper requirements for shipments of hazardous waste. Frequently, users of the HMR are not aware that the word "Waste" must precede the proper shipping name as provided by § 172.101(c)(9). We are proposing to add a new paragraph alerting the user to this requirement.

Section 172.504

In a final rule published on June 21, 2001 (HM–215D; 66 FR 33426), we authorized the display of only one placard bearing one compatibility letter when certain Class 1 materials of different compatibility groups are transported together in a single transport vehicle or container. We are proposing to amend § 172.504(g)(2) to clarify that explosives articles of compatibility groups C, D, or E when transported with explosives articles in compatibility group N may be placarded with a Class 1 compatibility group D placard.

Section 172.519

We are proposing to editorially revise paragraph (f) by adding the parenthetical phrase "(IBR, see § 171.7 of this subchapter)," after the wording "ICAO Technical Instructions, the IMDG Code, or the TDG Regulations".

Part 173

Section 173.7

Currently, § 173.7 authorizes military shipments of hazardous materials if the materials are packaged in accordance with the HMR or in packagings of equal or greater strength and efficiency as certified by DOD in accordance with the procedures prescribed by "Performance Oriented Packagings of Hazardous Material, DLAR 4145.41/AR 700–143/AFR 71–5/NAVSUPINST 4030.55/MCO 4030.40." The DOD has revised this document and renamed it "Packaging of Hazardous Material, DLAD 4145.41/AR 700–143/AFJI 24–210/NAVSUPINST 4030.55B/MCO 4030.40B." In this NPRM, we are proposing to update the reference to the revised document.

Section 173.28

In paragraph (b)(3), we are proposing to clarify that packagings made of fiberboard are authorized for reuse.

Section 173.31

Since January 1, 1978, new non-pressure tank cars have had bottom outlet protection. To determine retrofit requirements, the FRA and the industry participated in a risk-analysis evaluation of the commodities carried in these cars. Those commodities requiring bottom outlet protection were listed in Appendix Y to the Tank Car Manual (AAR Manual of Standards and Recommended Practices,—1002). From time to time, additional commodities have been added. As far back as 1981, the risk-analysis evaluation has determined that molten sulfur does not require any retrofitted protection; consequently, it was not listed. Based on similar analysis, elevated temperature materials were not listed. Despite this, the regulations promulgated under a final rule published on September 21, 1995 (HM–175A; 60 FR 49073), require retrofit by July 1, 2006, for all commodities not specifically listed in Appendix Y. In this NPRM we are proposing to lessen the burden on shippers of molten sulfur and elevated temperature materials by explicitly removing these commodities from the requirement to retrofit tank cars.

Section 173.150

Paragraph (f)(1) defines the term "combustible liquid" and states that a flammable liquid reclassed as "combustible liquid" may not be transported by air or vessel, except when other means of transportation is impracticable. Section 173.120 Class 3-Definitions, paragraph (b)(2), contains the same information. In this NPRM, we are proposing to remove paragraph (f)(1) to eliminate the redundancy.

Section 173.225

Currently, the Note to paragraph (e)(3)(vi) directs the reader to Appendix 5 of the UN Manual of Tests and Criteria

for an example of a method to determine the size of emergency-relief devices. The American Institute of Chemical Engineers (AIChE), in a document published in the Process Safety Progress Journal (*see* § 171.7 preamble), describes an alternative method to determine the size of emergency-relief devices on portable tanks transporting organic peroxides. In this NPRM, we are proposing to also authorize this alternative method.

Section 173.241

For clarity, in paragraph (c), we are proposing to add a reference to certain additional requirements in § 176.340 that apply when offering combustible liquids in portable tanks for transportation by vessel.

Section 173.301

In paragraph (a)(9), we are proposing to revise the second sentence containing a requirement that the outside packaging must conform to the requirements in § 173.25. Because of their thin walls, size, or shape, 2P, 2Q, 3E, 3HT, spherical 4BA, 4D, 4DA, 4DS, and 39 cylinders must be offered in a combination packaging, where the cylinder is the inner packaging contained in a strong non-bulk outer packaging. In addition to the applicable marking and labeling requirements in subparts D and E, respectively, the outer packaging must be marked with an indication that the inner packagings conform to the applicable specifications. This change will remove the implication that the outer packaging is an overpack and, as such, each inner packaging must meet the applicable part 172 marking and labeling requirements.

In paragraph (l)(2), we are proposing to revise the wording to state clearly that foreign cylinders filled for export must be fitted with pressure relief devices when required by the HMR for the gas contained within the cylinder. In a final rule published on August 8, 2002 (HM–220D; 67 FR 51645), we revised the language stating that the cylinders must meet the specifically listed requirements "in addition to other requirements of this subchapter." In removing the wording "in addition to other requirements of this subchapter," we inadvertently overlooked that the wording included compliance with the pressure relief device requirements.

We are proposing to editorially revise paragraph (m) by adding the parenthetical phrase "(IBR, see § 171.7 of this subchapter)" after the first occurrence of the term "Canadian Transport of Dangerous Goods (TDG) Regulations."

Section 173.302a

In paragraph (a), we are proposing a minor editorial change.

In paragraph (d), we are proposing to authorize use of a DOT 3AL1800 cylinder for the transportation of diborane and diborane mixtures.

We are proposing to add paragraph (e) to reinstate the requirement that a cylinder containing fluorine may not be charged to over 400 psig at 21 °C (70 °F) and may not contain more than 2.7 kg (6 lbs) of gas. It was brought to our attention that this requirement was removed in HM–220D and, for safety concerns, should be reinstated.

Section 173.304a

In the paragraph (a)(2) table, in column 3, we are proposing to remove several references to DOT specification 4, 4A, 9, 38, 40 and 41 cylinders. In a final rule published August 8, 2002 (HM–220D; 67 FR 51647) we discontinued authorization for the use of DOT 3C, 3D, 4, 4A, 4B240X, 4B240FLW, 4C, 9, 25, 26, 33, 38, 40 and 41 cylinders. Also, for the entry Bromotrifluoromethane, we propose to correct "DOT–3AL40" to read "DOT–3AL400" in column 3.

Sections 173.314 and 173.319

Currently the HMR require a shipper to notify the Bureau of Explosives (BOE) whenever a rail car containing a time-sensitive product is not received by the consignee within 20 days from shipment. We are proposing to revise the requirement to require notification to the appropriate office in the Federal Railroad Administration.

Section 173.315

We are proposing to revise the paragraph (a) table by adding a new Note 27 which authorizes the use of non-specification cargo tanks for the entry "Ammonia, anhydrous or Ammonia solutions, with greater than 50 percent ammonia."

Section 173.337

In the introductory text, we are proposing to reinstate a requirement that a cylinder containing nitric oxide may be charged to a pressure of not more than 5,170 kPa (750 psig) at 21 °C (70 °F). It was brought to our attention that this requirement was inadvertently removed in HM–220D and, for safety concerns, should be reinstated.

Part 178

Sections 178.338–2 and 178.345–2

We are proposing to remove the reference to ASTM Standard A 607 and add ASTM Standards A 1008/A 1008M and A 1011/A 1011M in its place. See § 171.7 preamble discussion.

Section 178.606

In paragraph (c)(2), we are proposing to correct the formula for calculating the pressure to be applied when a packaging containing a solid is subjected to a dynamic compression test. The formula currently in the HMR is applicable to liquids.

Part 179

Section 179.200–7

We are proposing to amend paragraph (e) by adding a reference to § 171.7 for a standard that is incorporated by reference.

Part 180

Section 180.205

In paragraph (c)(2), we are proposing to add a reference to new § 180.212. See § 180.212 preamble discussion. Also, we are proposing to broaden the provisions in paragraph (l)(2) to allow a composite cylinder that is condemned to have the wording "CONDEMNED" displayed instead of stamped on the cylinder. The use of a label is currently authorized in some exemptions.

Section 180.212

The HMR authorize the repair of DOT 4-series cylinders, but not DOT 3-series cylinders. In this NPRM, we are proposing to allow repairs to a DOT 3-series cylinder under the terms of an approval issued by the Associate Administrator under subpart H of part 107. In addition, the person that performs the repair work must have an approval as currently required under subpart I of part 107.

Note in this regard, however, that certain repairs to cylinders will not require an approval. For example, an approval will not be required for the removal and replacement of non-pressure components on a DOT 3-series cylinder, such as a neck ring or foot ring; the replacement material must be equivalent to that used at the time of original manufacture. Such repairs were authorized in former § 173.34(h) of the HMR for DOT 3A, 3AA, 3B, and the obsolete 3C cylinder when performed by a manufacturer of these types of cylinders, tested and repaired under the supervision of an inspector, and reported in accordance with the original specification. We removed § 173.34(h) from the HMR in HM–220D. In this NPRM, we propose to add these requirements back into the regulations and also allow repairs to be made by a DOT authorized repair facility.

Additionally, no approval will be required for the repair of worn or damaged cylinder neck threads when performed by the original cylinder manufacturer in accordance with the cylinder's specification requirements and under the supervision of an independent inspection agency. CGA Pamphlets C–6 and C–6.1 contain guidelines for inspection of the cylinder neck areas for damaged threads. The cylinder must be rejected if the required number of effective threads are not engaged to provide a gas-tight seal. The rejected cylinder may qualify for repair to restore the effectiveness of the threads. If the threads cannot be repaired, the cylinder must be condemned. We proposed to update the reference to CGA Pamphlet C–6.1 from the 1995 to the 2002 edition in an NPRM published on September 10, 2003 (HM–220F; 68 FR 53318). The 2002 edition contains criteria for inspection of cylinder neck threads for abnormal thread conditions resulting from structural defects, corrosion, or damage. Currently CGA is updating CGA Pamphlet C–6 to better address inspection for neck areas on high pressure and low pressure steel cylinders. We will consider adopting the revised pamphlet in a future notice of proposed rulemaking.

Section 180.417

In paragraph (b)(2)(v), we are proposing to reinstate the requirement that each test or inspection report completed for a repaired cargo tank must include the ASME or National Board Certificate of Authorization number of the facility performing the repairs.

Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule is not considered a significant regulatory action under section 3(f) and was not reviewed by the Office of Management and Budget (OMB). The proposed rule is not considered a significant rule under the Regulatory Policies and Procedures order issued by the U.S. Department of Transportation (44 FR 11034). The costs and benefits of this proposed rule are considered to be so minimal as to not warrant preparation of a regulatory impact analysis or a regulatory evaluation.

In this notice, we propose to amend miscellaneous provisions in the HMR to clarify the provisions and to relax overly burdensome requirements. We are also responding to requests from industry associations to update and add references to standards that are incorporated in the HMR. These clarifications and updates of the HMR will enhance safety.

B. Executive Order 13132

This proposed rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This proposed rule would preempt state, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Federal hazardous material transportation law, 49 U.S.C. 5125(b)(1), contains an express preemption provision (49 U.S.C. 5125(b)) preempting state, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(i) The designation, description, and classification of hazardous materials;

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(iii) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, content, and placement of those documents;

(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; or

(v) The design, manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of a packaging or container which is represented, marked, certified, or sold as qualified for use in the transport of hazardous materials.

This proposed rule concerns the classification, packaging, marking, labeling, and handling of hazardous materials, among other covered subjects. If adopted as final, this rule would preempt any State, local, or Indian tribe requirements concerning these subjects unless the non-Federal requirements are "substantively the same" (*see* 49 CFR 107.202(d)) as the Federal requirements.

Federal hazardous materials transportation law provides at 49 U.S.C. 5125(b)(2) that if RSPA issues a regulation concerning any of the covered subjects, RSPA must determine and publish in the **Federal Register** the effective date of Federal preemption. That effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. RSPA proposes the effective date of federal preemption be 90 days from publication of a final rule in this matter in the **Federal Register**.

C. Executive Order 13175

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this proposed rule does not have tribal implications, does not impose substantial direct compliance costs on Indian tribal governments, and does not preempt tribal law, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

D. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities. This proposed rule would amend miscellaneous provisions in the HMR to clarify provisions based on our own initiatives and also on petitions for rulemaking. While maintaining safety, it would relax certain requirements that are overly burdensome and would update references to consensus standards that are incorporated in the HMR. The proposed changes are generally intended to provide relief to shippers, carriers, and packaging manufacturers, including small entities.

This proposed rule has been developed in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered. The changes proposed in this Notice will enhance safety, and I certify that this proposal, if promulgated, would not have a significant economic impact on a substantial number of small entities.

E. Paperwork Reduction Act

This proposed rule may result in a minimal change in information collection and recordkeeping burden under OMB Control Number 2137–0559, due to editorial changes to §§ 173.314 and 173.319 regarding HMR requirements to notify BOE whenever a

rail car containing a time-sensitive product is not received by the consignee within 20 days from shipment. Since BOE no longer exists, we are proposing to remove references to BOE in §§ 173.314 and 173.319, and replace them with references to FRA. This proposed rule may result in a minimal change in burden since FRA instead of BOE will now be notified if a rail car containing a time-sensitive product is not received within 20 days from shipment. RSPA currently has an approved information collection under OMB Control Number 2137–0559, "Requirements for Rail Tank Car Tanks—Transportation of Hazardous Materials by Rail" with 2,759 burden hours which expires on May 31, 2006.

Section 1320.8(d), Title 5, Code of Federal Regulations requires that RSPA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies a new information collection request that RSPA will submit to OMB for approval based on the requirements in this proposed rule.

RSPA has developed burden estimates to reflect changes in this proposed rule. RSPA estimates the total information and recordkeeping burden as proposed in this rule as: Requirements for Rail Tank Car Tanks—Transportation of Hazardous Materials by Rail" OMB Number 2137–0559:

Total Annual Number of Respondents: 266.
Total Annual Responses: 16,781.
Total Annual Burden Hours: 2,689.
Total Annual Burden Cost: $102,586.25.

Requests for a copy of this information collection should be directed to Deborah Boothe or T. Glenn Foster, Office of Hazardous Materials Standards (DHM–10), Research and Special Programs Administration, Room 8430, 400 Seventh Street, SW., Washington, DC 20590–0001, telephone (202) 366–8553.

All comments should be addressed to the Dockets Unit as identified in the **ADDRESSES** section of this rulemaking, and received prior to the close of the comment period identified in the **DATES** section of this rulemaking. In addition, you may submit comments specifically related to the information collection burden to the RSPA Desk Officer, OMB, at fax number 202–395–6974. Under the Paperwork Reduction Act of 1995, no person is required to respond to an information collection unless it displays a valid OMB control number.

F. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

G. Unfunded Mandates Reform Act

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $120.7 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

H. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321–4347) requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. We developed an assessment to determine the effects of the proposed revisions on the environment and whether a more comprehensive environmental impact statement may be required. We have tentatively concluded that there are no significant environmental impacts associated with this proposed rule. Interested parties, however, are invited to review the Environmental Assessment available in the docket and to comment on what environmental impact, if any, the proposed regulatory changes would have.

I. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov.*

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 178

Hazardous materials transportation, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 179

Hazardous materials transportation, Incorporation by reference, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 180

Hazardous materials transportation, Incorporation by reference, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Chapter I is proposed to be amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45 and 1.53; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–134 section 31001.

2. In § 171.7:

a. In the paragraph (a)(3) table:

(1) A new entry for the American Institute of Chemical Engineers is added to the table in appropriate alphabetical order;

(2) Under the entry "American Society for Testing and Materials,", the entry for ASTM Standard A 607–98 is removed and two new standards are added in appropriate numerical order;

(3) Under the entry "Chlorine Institute, Inc.", the entries for Chlorine Institute Emergency Kit "A" and "B" are revised;

(4) Under the entry "Department of Defense (DOD)," a new entry is added in appropriate alphabetical order; and

(5) Under the entry "Transport Canada," the entry is revised.

b. In the paragraph (b) table, the entry "National Association of Corrosion Engineers" is removed.

The revisions and additions read as follows:

§ 171.7 Reference material.

(a) * * *

(c) *Table of material incorporated by reference.* * * *

Source and name of material	49 CFR reference
* * * * * * *	
American Institute of Chemical Engineers,	
3 Park Avenue, New York, NY 10016–5991, AICChE Process Safety Progress Journal, June 2002, issue (Vol. 21, No. 2), An Example of a Text Method for Vent Sizing—OPPSD/SPI Methodology	173.225
* * * * * * *	
American Society for Testing and Materials,	
* * * * * * *	
ASTM A 1008/A 1008M—03 Standard Specification for Steel, Sheet, Cold-Rolled, Carbon, Structural, High-Strength Low-Alloy and High Strength Low-Alloy with Improved Formability	178.338–2; 178.345–2
ASTM A 1011/A 1011M—03a Standard Specification for Steel, Sheet and Strip, Hot-Rolled, Carbon, Structural, High-Strength Low Alloy and High Strength Low-Alloy with Improved Formability	178.338–2; 178.345–2
* * * * * * *	
The Chlorine Institute, Inc.,	
* * * * * * *	
Chlorine Institute Emergency Kit "A" for 100-lb. & 150 lb. Chlorine Cylinders (with the exception of repair method using Device 8 for side leaks), Edition 10, June 2003	173.3
Chlorine Institute Emergency Kit "B" for Chlorine Ton Containers (with the exception of repair method using Device 9 for side leaks), Edition 9, June 2003	173.3
* * * * * * *	
Department of Defense, (DOD),	
* * * * * * *	
Packaging of Hazardous Material, DLAD 4145.41/AR 700–143/AFJI 24–210/NAVSUPINST 4030.55B/MCO 4030.40B	173.7
* * * * * * *	
Transport Canada,	
* * * * * * *	
Transportation of Dangerous Goods (TDG) Regulations, August 2001 including Clear Language Amendments SOR/2001–286, and Amendment 1 SOR/2002–306), Amendment 2 (SOR/2003–273), and Amendment 3 (SOR/2003–400)	171.12a; 172.401; 172.502; 172.519; 172.602; 173.301.
* * * * * * *	

§ 171.8 [Amended]

3. In § 171.8, the definition for "Materials of trade" is amended by removing the wording "in direct support of a principal business that is other than transportation by motor vehicle".

4. In § 171.12a, paragraph (b)(2) is revised to read as follows:

§ 171.12a Canadian shipments and packagings.

* * * * *

(b) * * *

(2) A material designated as a hazardous material under this subchapter which is not subject to the requirements of the TDG Regulations or is afforded hazard communication or packaging exceptions not authorized in this subchapter (*e.g.*, paragraph 1.16 of the TDG Regulations excepts quantities of hazardous materials less than or equal to 500 kg gross transported by highway or rail) may not be transported under the provisions of this section.

* * * * *

§ 171.14 [Amended]

5. In § 171.14, paragraph (d)(3) is removed and reserved.

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

6. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.53.

7. In § 172.101, the first and second sentence in paragraph (i)(3), are revised and a new paragraph (i)(5) is added to read as follows:

§ 172.101 Purpose and use of the hazardous materials table.

* * * * *

(i) * * *

(3) * * * Column 8C specifies the section in part 173 of this subchapter which prescribes packaging requirements for bulk packagings, subject to the limitations, requirements and additional authorizations of Columns 7 and 8B. A "None" in Column 8C means bulk packagings are not authorized, except as may be provided by special provisions in Column 7 and in Column 8B. * * *

* * * * *

(5) *Cylinders.* For cylinders, both non-bulk and bulk packaging authorizations are set forth in Column 8B. Notwithstanding a designation of "None" in Column 8C, a bulk cylinder

may be used when specified through the section reference in Column 8B.

* * * * *

8. In § 172.101, the Hazardous Materials Table is amended by removing, adding and revising, in the appropriate alphabetical sequence, the following entries to read as follows:

§ 172.101.—HAZARDOUS MATERIALS TABLE

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification numbers	PG	Label codes	Special provisions (§ 172.102)	Packaging (§ 173.***) (8)			Quantity limitations (9)		Vessel stowage (10)	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
		*	*	*	*	*	*		*	*			
	[REMOVE:]												
		*	*	*	*	*	*		*	*			
+	Bromine *or* Bromine solutions.	8	UN1744	I	8, 6.1	1, A3, A6, B9, B64, B85, N34, N43, T22, TP2, TP10, TP12, TP13.	None	226	249	Forbidden	Forbidden		12, 40, 66, 74, 89, 90
		*	*	*	*	*	*		*	*			
	[ADD:]	*	*	*	*	*	*		*	*			
		* *	*	*	*	*	*		*	*			
+	Bromine	8	UN1744	I	8, 6.1	1, B9, B64, B85, N34, N43, T22, TP2, TP10, TP12, TP13.	None	226	249	Forbidden	Forbidden	D	12, 40, 66, 74, 89, 90
+	Bromine solutions.	8	UN1744	I	8, 6.1	1, B9, B64, B85, N34, N43, T22, TP2, TP10, TP12, TP13.	None	226	249	Forbidden	Forbidden	D	12, 40, 66, 74, 89, 90
+	Bromine solutions.	8	UN1744	I	8, 6.1	2, B9, B64, B85, N34, N43, T22, TP2, TP10, TP12, TP13.	None	227	249	Forbidden	Forbidden	D	12, 40, 66, 74, 89, 90
		*	*	*	*	*	*		*	*			
D	Denatured alcohol.	3	NA1987	II	3	172,T8, T31	150	202	242	5L	60L	B	
				III	3	172, B1, T7, T30	150	203	242	60L	220L	A	
		*	*	*	*	*	*		*	*			
	[REVISE:]												
		*	*	*	*	*	*		*	*			
	Alcohols, n.o.s.	3	UN1987	I	3	172, T11, TP1, TP8, TP27.	None	201	243	1 L	30 L	E	
				II	3	172, 1B2, T7, TP1, TP8, TP28.	150	202	242	5 L	60 L	B	
				III	3	172, B1, IB3, T4, TP1, TP29.	150	203	242	60 L	220 L	A	
		*	*	*	*	*	*		*	*			
D	Sec-Butyl chloroformate.	6.1	NA2742	I	6.1, 3, 8	2, B9, B14, B32, B74, T20, TP4, TP12, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	A	12, 13, 22, 25, 40, 48, 100
		*	*	*	*	*	*		*	*			
D	Isobutyl chloroformate.	6.1	NA2742	I	6.1, 3, 8	2, B9, B14, B32, B74, T20, TP4, TP12, TP13, TP38, TP45.	None	227	244	Forbidden	Forbidden	A	12, 13, 22, 25, 40, 48, 100

*	*	*	*	*	*	*	*	*	*	*	*
Refrigerating machines, *containing flammable, non-toxic, liquefied gas.*	2.1	UN3358		2.1		306, 307	306	306	Forbidden	Forbidden	D
*	*	*	*	*	*	*	*	*	*	*	*
1,3,5-Trimethylbenzene.	3	UN2325	III	3	B1, IB3, T2, TP1	150	203	242	60 L	220 L	A
*	*	*	*	*	*	*	*	*	*	*	*

9. In § 172.102, in paragraph (c)(1), Special revision 53, the first sentence is revised and new Special provision 172 is added in appropriate numerical order to read as follows:

§ 172.102 Special provisions.

* * * * *

(c) * * *

(1) * * *

53 Packages of these materials must bear the subsidiary risk label, "EXPLOSIVE", and the subsidiary hazard class/division must be entered in parentheses immediately following the primary hazard class in the shipping description, unless otherwise provided in this subchapter or through an approval issued by the Associate Administrator, or the competent authority of the country of origin. * * *

* * * * *

172 This entry includes alcohol mixtures containing up to 5% petroleum products.

* * * * *

10. In § 172.203, a new paragraph (l)(4) is added to read as follows:

§ 172.203 Additional description requirements.

* * * * *

(l) * * *

(4) Except when transported aboard vessel, marine pollutants in non-bulk packagings are not subject to the requirements of this subchapter (see § 171.4 of this subchapter).

* * * * *

11. In § 172.205, a new paragraph (i) is added to read as follows:

§ 172.205 Hazardous waste manifest.

* * * * *

(i) The shipping description for a hazardous waste must be modified as required by § 172.101(c)(9).

12. In § 172.504, paragraph (g)(2) is revised to read as follows:

§ 172.504 General placarding requirements.

* * * * *

(g) * * *

(2) Explosive articles of compatibility groups C, D, or E, when transported with those in compatibility group N, may be placarded displaying compatibility group D.

* * * * *

§ 172.519 [Amended]

13. In § 172.519, in paragraph (f), the wording "the ICAO Technical Instructions, the IMDG Code, or the TDG Regulations," is removed and the wording "the ICAO Technical Instructions, the IMDG Code, or the TDG Regulations (IBR, see § 171.7 of this subchapter)," is added in its place.

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

14. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45, 1.53.

§ 173.7 [Amended]

15. In § 173.7, paragraph (a), the wording "Performance Oriented Packaging of Hazardous Material, DLAR 4145.41/AR 700–143/AFR 71–5/ NAVSUPINST 4030.55/MCO 4030.40" is removed and the wording "Packaging of Hazardous Material, DLAD 4145.41/ AR 700–143/AFJI 24–210/ NAVSUPINST 4030.55B/MCO 4030.40B (IBR, see § 171.7 of this subchapter)" is added in its place.

16. In § 173.28, paragraph (b)(3) is revised to read as follows:

§ 173.28 Reuse, reconditioning and remanufacture of packagings.

* * * * *

(b) * * *

(3) Packagings made of paper (other than fiberboard), plastic film, or textile are not authorized for reuse;

* * * * *

17. In § 173.31, paragraph (b)(5), the second sentence is revised to read as follows:

§ 173.31 Use of tank cars.

* * * * *

(b) * * *

(5) * * * Tank cars not requiring bottom-discontinuity protection under the terms of Appendix Y of the AAR Specifications for Tank Cars as of July 1, 1996, must conform to these requirements no later than July 1, 2006, except that tank cars transporting a material that is hazardous only because it meets the definition of an elevated temperature material or because it is molten sulfur do not require bottom discontinuity protection. * * *

* * * * *

§ 173.150 [Amended]

18. In § 173.150, paragraph (f)(1) is removed and paragraphs (f)(2), (f)(3) and (f)(4) are redesignated as (f)(1), (f)(2) and (f)(3) respectively.

19. In § 173.225, the Note to paragraph (e)(3)(vi) is revised to read as follows:

§ 173.225 Packaging requirements and other provisions for organic peroxides.

* * * * *

(e) * * *

(3) * * *

(vi) * * *

Note To Paragraph (e)(3)(vi): Examples of methods to determine the size of emergency-relief devices are given in Appendix 5 of the UN Manual of Tests and Criteria (IBR, see § 171.7 of this subchapter) and AIChE Process Safety Progress Journal, Vol. 21, No. 2 (IBR, see § 171.7 of this subchapter).

* * * * *

§ 173.241 [Amended]

20. In § 173.241, paragraph (c) is amended by adding a new last sentence to read as follows:

§ 173.241 Bulk packagings for certain low hazard liquid and solid materials.

* * * * *

(c) * * * For transportation of combustible liquids by vessel, additional requirements are specified in § 176.340 of this subchapter.

* * * * *

21. In § 173.301, paragraphs (a)(9), (l)(2) and (m) introductory text are revised to read as follows:

§ 173.301 General requirements for shipment of compressed gases in cylinders and spherical pressure vessels.

(a) * * *

(9) Specification 2P, 2Q, 3E, 3HT, spherical 4BA, 4D, 4DA, 4DS, and 39 cylinders must be packed in strong non-bulk outer packagings. The outside of the combination packaging must be marked with an indication that the inner packagings conform to the prescribed specifications.

* * * * *

(l) * * *

(2) In addition to other requirements of this subchapter, the maximum filling density, service pressure, and pressure relief device for each cylinder conform to the requirements of this part for the gas involved.

* * * * *

(m) *Canadian cylinders in domestic use.* A Canadian Transport Commission (CTC) specification cylinder manufactured, originally marked and approved in accordance with the CTC regulations and in full conformance with the Canadian Transport of Dangerous Goods (TDG) Regulations (IBR, see § 171.7 of this subchapter) is authorized for the transportation of a hazardous material to, from or within the United States under the following conditions:

* * * * *

22. In § 173.302a, new paragraph (e) is added and paragraph (a)(3) and the first sentence in paragraph (d) are revised to read as follows:

§ 173.302a Additional requirements for shipment of non-liquefied (permanent) compressed gases in specification cylinders.

* * * * *

(a) * * *

(3) *DOT 39 cylinders.* When the cylinder is filled with a Division 2.1 material, the internal volume of the cylinder may not exceed 1.23 L (75 in^3).

* * * * *

(d) * * * Diborane and diborane mixed with compatible compressed gas must be offered in a DOT 3AL1800 or 3AA1800 cylinder. * * *

(e) *Fluorine.* Fluorine must be shipped in specification 3A1000, 3AA1000, or 3BN400 cylinders without pressure relief devices and equipped with valve protection cap. The cylinder may not be charged to over 400 psig at 21 °C (70 °F) and may not contain over 2.7 kg (6 lbs) of gas.

23. In § 173.304a, in the paragraph (a)(2) table, in column 1, for the entry "Methyl acetylene-propadiene, mixtures, stabilized" remove the phrase "DOT–3A240"; and in column 3 make the following changes:

a. For the entry "Anhydrous ammonia", remove the phrases "DOT–4;" and "DOT–4A480;";

b. For the entry "Bromotrifluoromethane", remove the phrase "DOT–4A400;" and correct the entry "DOT–3AL40" to read "DOT–3AL400.";

c. For the entry "Chlorodifluoromethane ®-22)", remove the phrase "DOT–41;";

d. For the entry "Chloropentafluorethane ®-115)", remove the phrase "DOT–4A225;";

e. For the entry "Cyclopropane", remove the phrase "DOT–4A225;";

f. For the entry "Dichlorodifluoromethane ®-12)", remove the phrases "DOT–4A225;", "DOT–9;" and "DOT–41;";

g. For the entry "Dichlorodifluoromethane and difluoroethane mixture (constant boiling mixture) (R–500)", remove the phrases "DOT–4A240;" and "DOT–9;";

h. For the entry "Hydrogen sulfide", remove the phrase "DOT–4A480;";

i. For the entry "Insecticide, gases liquefied", remove the phrases "DOT–9; DOT–40;" and "DOT–41;";

j. For the entry "Methyl acetylene-propadiene, mixtures, stabilized", remove the phrase "DOT–4; DOT–41;";

k. For the entry "Methyl chloride", remove the phrases "DOT–4A225;" "DOT–4; DOT–38;" and "DOT–4A150;";

l. For the entry "Refrigerant gas, n.o.s. or Dispersant gas, n.o.s.", remove the phrases "DOT–4A240;" and "DOT–9;";

m. For the entry "Sulfur dioxide", remove the phrases "DOT–4A225;" and "DOT–4; DOT–38;";

n. For the entry "Trifluorochloroethylene, stabilized", remove the phrase "DOT–4A300;".

24. In § 173.314, paragraph (g)(1) is revised to read as follows:

§ 173.314 Compressed gases in tank cars and multi-unit tank cars.

* * * * *

(g) * * *

(1) The shipper shall notify the Federal Railroad Administration whenever a tank car is not received by the consignee within 20 days from the date of shipment. Notification to the Federal Railroad Administration may be made by e-mail to *Hmassist@fra.dot.gov* or telephone call to (202) 493–6229.

* * * * *

25. In § 173.315, in the paragraph (a) table, column 4, amend the entry "Ammonia, anhydrous or Ammonia solutions with greater than 50% ammonia" by removing the wording "Notes 12 and 17" and adding the wording "Notes 12, 17 and 27" in its place and following the table, add Note 27 in the appropriate numerical order to read as follows:

§ 173.315 Compressed gases in cargo tanks and portable tanks.

* * * * *

(a) * * *

Note 27: Non-specification cargo tanks may be used for transportation of Ammonia, anhydrous and ammonia solutions with greater than 50% ammonia, subject to the conditions prescribed in paragraph (m) of this section.

* * * * *

26. In § 173.319, paragraph (a)(3) is revised to read as follows:

§ 173.319 Cryogenic liquids in tank cars.

* * * * *

(a) * * *

(3) The shipper shall notify the Federal Railroad Administration whenever a tank car containing any flammable cryogenic liquid is not received by the consignee within 20 days from the date of shipment. Notification to the Federal Railroad Administration may be made by e-mail to *Hmassist@fra.dot.gov* or telephone call to (202) 493–6229.

* * * * *

27. In § 173.337, introductory text, the first sentence is revised to read as follows:

§ 173.337 Nitric oxide.

Nitric oxide must be packed in DOT 3A1800, 3AA1800, 3E1800, or 3AL1800 cylinders charged to a pressure of not more than 5,170 kPa (750 psig) at 21 °C (70 °F) and conforming to the requirements in § 173.40. * * *

PART 178—SPECIFICATIONS FOR PACKAGINGS

28. The authority citation for part 178 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

29. In § 178.338–2, paragraph (a), the last sentence is revised to read as follows:

§ 178.338–2 Material.

(a) * * * All material used for evacuated jacket pressure parts must conform to the chemistry and steelmaking practices of one of the material specifications of Section II of the ASME Code or the following ASTM Specifications: A 242, A 441, A514, A572, A 588, A 606, A 633, A 715, A1008/A 1008M, A 1011/A 1011M.

* * * * *

§ 178.345–2 [Amended]

30. In § 178.345–2, paragraph (a)(1), the wording "ASTM A 607" is removed and the wording "ASTM A 1008/ A 1008M, "ASTM A 1011/A 1011M" is added in the appropriate numerical order.

§ 178.606 [Amended]

31. In § 178.606, in paragraph (c)(2)(ii), make the following changes:

a. For the formula, remove the wording "Solids: $A = (n - 1) [w + (s \times v \times 8.3 \times .95) \times 1.5$" and add the wording "Solids: $A = (n - 1) (m \times 1.5)$" in its place; and

b. In the definitions following the formula, add the wording "m=the certified maximum gross mass for the container in kilograms;" in appropriate alphabetical order.

PART 179—SPECIFICATIONS FOR TANK CARS

32. The authority citation for part 179 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR part 1.53.

33. In § 179.200–7, paragraph (e), the first sentence is revised to read as follows:

§ 179.200–7 Materials.

* * * * *

(e) *Nickel plate.* Nickel plate must comply with the following specification (IBR, see § 171.7 of this subchapter):

* * *

* * * * *

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

34. The authority citation for part 180 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

35. In § 180.205, paragraphs (c)(2)(I), (I)(2) and (I)(3) are revised to read as follows:

§ 180.205 General requirements for requalification of cylinders.

* * * * *

(c) * * *

(2) * * *

(i) Rejected and may be repaired or rebuilt in accordance with § 180.211 or 180.212, as appropriate; or

* * * * *

(i) * * *

(2) When a cylinder must be condemned, the requalifier must —

(i) Stamp a series of X's over the DOT specification number and the marked pressure or stamp "CONDEMNED" on the shoulder, top head, or neck using a steel stamp;

(ii) For composite cylinders, securely affix a label with the word "CONDEMNED", overcoated with epoxy near but not obscuring the original manufacturer's label, to the cylinder; or

(iii) As an alternative to the stamping or labeling as described in this paragraph (I)(2), at the direction of the owner, the requalifier may render the cylinder incapable of holding pressure.

(3) No person may remove or obliterate the "CONDEMNED" marking. In addition, the requalifier must notify the cylinder owner, in writing, that the cylinder is condemned and may not be filled with hazardous material and offered for transportation in commerce where use of a specification packaging is required.

36. A new section 180.212 is added to read as follows:

§ 180.212 Repair of DOT–3 series specification cylinders.

(a) *General requirements for repair of DOT 3 series cylinders.* No person may repair a DOT 3-series cylinder unless prior approval has been obtained in accordance with this section. The repair facility must hold an approval as specified in § 107.805 of this subchapter. The repair and the inspection must conform to the requirements of the applicable cylinder specification contained in part 178 of this subchapter and, except as provided in paragraph (b) of this section, the provisions of an approval issued under subpart H of Part 107 of this subchapter. The person performing the repair must prepare a report containing, at a minimum, the results prescribed in § 180.215.

(b) *Repairs not requiring prior approval.* Approval is not required for the following specific repairs:

(1) The removal and replacement of a neck ring or foot ring on a DOT 3A, 3AA, or 3B cylinder that does not affect a pressure part of the cylinder when performed by a repair facility or a cylinder manufacturer of these types of cylinders. The repair may be made by welding or brazing in conformance with the original specification. After removal and before replacement, the cylinder must be visually inspected and defective cylinders must be rejected. The heat treatment, testing and inspection of the repair under the supervision of an inspector must be performed in accordance with the original specification.

(2) External re-threading of a DOT 3AX, 3AAX or 3T cylinder or internal re-threading of a DOT–3 series cylinder to restore the total number of neck threads engaged to the condition specified in the applicable specification. The repair work must be performed by the original manufacturer of the cylinder. Upon completion of the re-threading, the threaded opening must be inspected by an independent inspection agency and gauged in accordance with Federal Standard H–28 or an equivalent standard containing the same specification limits. The re-threaded cylinder must be stamped clearly and legibly with the words "RETHREAD" on the shoulder, top head, or neck. No cylinder may be re-threaded more than one time without approval of the Associate Administrator.

37. In § 180.417, paragraph (b)(2)(v) is revised to read as follows:

§ 180.417 Reporting and record retention requirements.

* * * * *

(b) * * *

(2) * * *

(v) ASME or National Board Certificate of Authorization number of facility performing repairs, if applicable;

* * * * *

Issued in Washington, DC on August 5, 2004, under authority delegated in 49 CFR part 106.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 04–18357 Filed 8–11–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 040726216–4216–01; I.D. 070804B]

RIN 0648–AS49

Atlantic Highly Migratory Species; Reducing Sea Turtle Interactions With Fishing Gear

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking (ANPR); request for comments.

SUMMARY: NMFS is considering adjustments to the regulations governing the Atlantic highly migratory species (HMS) pelagic longline fishery based upon a June 1, 2004, Biological Opinion (2004 BiOp) regarding Atlantic sea turtles. NMFS issues this ANPR to request comments on potential regulatory changes to further reduce bycatch and bycatch mortality of sea turtles in the Atlantic pelagic longline fishery as well comments on as the feasibility of framework mechanisms to address unanticipated increases in sea turtle interactions and mortalities, should they occur.

DATES: Written comments on this ANPR must be received no later than October 12, 2004.

ADDRESSES: You may submit comments by any of the following methods:

- Email: *ID070804B@noaa.gov.* Include in the subject line the following identifier: I.D. 070804B.
- Federal e-Rulemaking Portal: *http://www.regulations.gov.*
- Mail: Christopher Rogers, Chief, Highly Migratory Species Management Division (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910.
- Fax: (301)713–1917.

Related documents, including the 2004 BiOp, are available upon request at the mailing address noted above or on the HMS Management Division's web page at: *http://www.nmfs.noaa.gov/sfa/hms.* In addition, the main resource laws that guide NMFS can be found at *www.nmfs.noaa.gov/legislation.htm.*

FOR FURTHER INFORMATION CONTACT: Russell Dunn, 727–570–5447; fax: 727–570–5656.

SUPPLEMENTARY INFORMATION: The Atlantic tuna and swordfish fisheries are managed under the authority of the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act (ATCA). Atlantic sharks are managed under the authority of the Magnuson-Stevens Act. The Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP)and Amendment 1 to the Atlantic Billfish Fishery Management Plan are implemented by regulations at 50 CFR part 635. The Atlantic pelagic longline (PLL) fishery for these HMS is also subject to the requirements of the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA).

Background

NMFS announced the availability of a Final Supplementary Environmental Impact Statement (FSEIS) concerning the reduction of sea turtle bycatch and bycatch mortality in the Atlantic PLL fishery on June 25, 2004 (69 FR 35599), and subsequently published a final rule on July 6, 2004 (69 FR 40734)to implement management measures to reduce bycatch and bycatch mortality of Atlantic sea turtles in the Atlantic PLL fishery. That rulemaking was based on the results of the 3–year Northeast Distant (NED) Closed Area research experiment involving interactions of PLL fishing gear and Atlantic sea turtles, other available studies and information on circle hook and bait treatments, and public comments.

A 2004 BiOp issued for the Atlantic PLL fishery found that the measures that subsequently were included in the final rule were not likely to jeopardize the continued existence of loggerhead, green, hawksbill, Kemp's ridley, or olive ridley sea turtles, but were likely to jeopardize the continued existence of leatherback sea turtles. The 2004 BiOp also identified a Reasonable and Prudent Alternative necessary to avoid jeopardy, and contained an Incidental Take Statement (ITS) for the PLL that specifies the maximum authorized number of interactions with sea turtles. Among other actions, the 2004 BiOp specifies that NMFS review quarterly and annually sea turtle take estimates, and, should these estimates indicate that the PLL fishery is not likely to stay within the authorized 3–year take levels specified in the 2004 BiOp, NMFS shall take corrective action to avoid long-term elevations in sea turtle interactions and ensure that the ITS is not exceeded. Additionally, NMFS must monitor sea turtle post-hooking mitigation and release, and take corrective action to reduce mortalities if fleet-wide gear removal rates are not sufficient to meet mortality performance targets contained in the 2004 BiOp. In this notice, NMFS announces its intent to undertake additional rulemaking and non-regulatory actions, as necessary, to implement requirements of the 2004 BiOP to ensure that the mortality targets and ITS are not met nor exceeded.

The PLL fishery is currently operating under the ITS level specified in the 2004 BiOp; thus, no corrective actions are needed at this time. However, the 2004 BiOp advises consideration of a framework mechanism to facilitate more timely implementation of corrective actions and to provide greater certainty on potential management responses. Thus, in this ANPR, NMFS is exploring a potential mechanism and/or individual corrective actions that might be necessary if any exceedance occurs.

Potential Management Measures

If sea turtle interactions and/or mortality exceed anticipated levels, the 2004 BiOp specifies that corrective measures should be taken. As described below, such actions could include time/area closures, additional gear modifications or gear restrictions, improvements in gear removal tool design, training program adjustments, or any other action that is deemed appropriate. The goal of any of these management measures would be to ensure that total sea turtle takes do not exceed long-term average take rates over 3–year periods. These measures may be considered individually or as an overarching framework that would give NMFS the ability to adjust the management measures, as appropriate, in order to reduce sea turtle bycatch and bycatch mortality, per the 2004 BiOp.

If the ITS is expected to be exceeded, potential time/area closures could include modifications to existing closures or the addition of partial, rolling or permanent closures. NMFS may also consider establishing Dynamic Area Management protocols similar to those established under the Atlantic Large Whale Take Reduction Plan. Any of these types of closures could act to remove effort from areas where and when a large number of sea turtle interactions are likely to occur in order to reduce the number of sea turtle interactions.

Additional potential management measures to prevent exceeding the mortality targets or ITS could include limits on fishing effort including limiting the number of sets fishery-wide, the number of sets per trip, the number of hooks per set, or the number of trips per year or quarter. In addition, NMFS may consider options to close the fishery for the month, quarter, fishing season, or year if a certain number of sea turtles are taken per set, trip, or quarter based on observed, estimated, or reported takes. NMFS may also consider additional modifications to existing hook and bait configurations or the turtle release gear, as more information is collected and analyzed. These types of management measures could reduce fishing effort and/or improve post-release survival in order to ensure that the ITS specified in the 2004 BiOp is not exceeded.

Request for Comments

NMFS requests comments on possible changes to the current regulations regarding fishing for Atlantic HMS with pelagic longline gear. Specifically, NMFS requests comments on individual or framework actions, including those described above, to ensure that mortality targets and the ITS specified in the BiOp are not met nor exceeded. In addition, NMFS also requests comments on any other possible regulatory changes that might further minimize sea turtle bycatch or bycatch mortality.

Written comments received by the due date will be considered in drafting any proposed changes to the Atlantic HMS regulations. In developing any proposed regulations, NMFS will need to consider and analyze the ecological impacts of any actions under consideration with regards to target species and protected species, such as sea turtles, and other possible environmental effects. NMFS will also need to analyze the social and economic impacts of any changes to the fishery and related industries. To that end, NMFS would appreciate any comments that include information that would aid in those analyses. For example, comments could address how different types of regulatory measures may affect sea turtles or the PLL fishery. From the resource perspective, comments could address regulatory measures that would further protect sea turtles. Comments could also address how the PLL fishery may be impacted, both strategically and economically, by any changes that would further protect sea turtles, and suggest measures that would protect sea turtles but yet be compatible with the PLL fishery, or suggest measures that would minimize any unavoidable negative impacts on the fishery. Relevant data or other information could be included in support of these comments.

Classification

This action is significant pursuant to Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: August 9, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 04–18474 Filed 8–11–04; 8:45 am]

BILLING CODE 3510–22–S

Notices

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

National Advisory Council on Maternal, Infant and Fetal Nutrition; Notice of Meeting

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. II, this notice announces a meeting of the National Advisory Council on Maternal, Infant and Fetal Nutrition.

DATES: September 8–10, 2004, 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at the Food and Nutrition Service, 3101 Park Center Drive, Conference Room 204–B, Alexandria, Virginia 22302.

FOR FURTHER INFORMATION CONTACT: Lisa Christie, Supplemental Food Programs Division, Food and Nutrition Service, Department of Agriculture, (703) 305–2746.

SUPPLEMENTARY INFORMATION: The Council will continue its study of the Special Supplemental Nutrition Program for Women, Infants and Children, and the Commodity Supplemental Food Program. The agenda items will include a discussion of general program issues. Meetings of the Council are open to the public. Members of the public may participate, as time permits. Members of the public may file written statements with the contact person named above, before or after the meeting.

Dated: August 5, 2004.

Roberto Salazar,

Administrator.

[FR Doc. 04–18470 Filed 8–11–04; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Ketchikan Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Ketchikan Resource Advisory Committee will meet in Ketchikan, Alaska, September 23, 2004, and November 18, 2004. The purpose of these meetings is to discuss potential projects under the Secure Rural Schools and Community Self-Determination Act of 2000.

DATES: The meetings will be held September 23, 2004, and November 18, 2004.

ADDRESSES: The meetings will be held at the Southeast Alaska Discovery Center Learning Center (back entrance), 50 Main Street, Ketchikan, Alaska. Send written comments to Ketchikan Resource Advisory Committee, c/o District Ranger, USDA Forest Service, 3031 Tongass Ave., Ketchikan, AK 99901, or electronically to *jingersoll@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Jerry Ingersoll, District Ranger, Ketchikan-Misty Fiords Ranger District, Tongass National Forest, (907) 228–4100.

SUPPLEMENTARY INFORMATION: The meetings are open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: August 5, 2004.

Forrest Cole,

Forest Supervisor.

[FR Doc. 04–18439 Filed 8–11–04; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the New York Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a conference call of the New York Advisory Committee will convene at 12 p.m. and adjourn at 1 p.m., Thursday, August 19, 2004. The purpose of the conference call is to discuss the scope of the SAC's current civil rights project idea and arrive at an outline for the project proposal.

This conference call is available to the public through the following call-in number: 1–800–497–7708, access code: 25514714. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls not initiated using the supplied call-in number or over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls using the call-in number over land-line connections. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and access code number.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Aonghas St-Hilaire of the Eastern Regional Office, 202–376–7533 (TTY 202–376–8116), by 4 p.m. on Wednesday, August 18, 2004.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC August 6, 2004.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 04–18452 Filed 8–11–04; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–427–801, A–428–801, A–475–801, A–588–804, A–559–801, A–412–801]

Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Extension of Time Limit for Final Results of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration,Department of Commerce.

ACTION: Notice of extension of time limit for final results of antidumping duty administrative reviews.

SUMMARY: The Department of Commerce is extending the time limit for the final results of the administrative reviews of the antidumping duty orders on antifriction bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom. The final results of these reviews are now due September 8, 2004.

EFFECTIVE DATE: August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Susan Lehman or Richard Rimlinger, AD/CVD 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0180 and (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

At the request of interested parties, the Department of Commerce initiated administrative reviews of the antidumping duty orders on antifriction bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom for the period May 1, 2002, through April 30, 2003. See, *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 68 FR 39055, (July 1, 2003), and *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part and Deferral of Administrative Reviews*, 68 FR 44524, (July 29, 2003). On February 9, 2004, the Department published its preliminary findings. See *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, Notice of Intent to Rescind Administrative Reviews, and Notice of Intent to Revoke Order in Part*, 69 FR 5950, (February 9, 2004). The final results of reviews were originally scheduled for June 8, 2004. On May 3, 2004, the Department published a notice extending the date for issuing the final results of these reviews until August 9, 2004. See *Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Extension of Time Limit for Final Results of Antidumping Duty Administrative Reviews*, 69 FR 24121, (May 3, 2004). *Extension of Time Limit for Final Results of Antidumping Duty Administrative Reviews*

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to issue the final results of an antidumping duty administrative review within 120 days of the date on which the preliminary results are published. The administering authority may extend the period of time for making a final determination without extending the time for making a preliminary determination, if such determination is made no later than 300 days after the date on which the preliminary determination is published. Completion of the final results of these reviews within the previously-extended period is not practicable because of the large number of respondents and the complexity of the issues raised in these reviews. Therefore, we are extending the time period for issuing the final results of these reviews by 30 days, until September 8, 2004.

This notice is published in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

Dated: August 5, 2004.

Jeffrey May,

Deputy Assistant Secretary for Import Administration, Group I.

[FR Doc. 04–18454 Filed 8–11–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–897]

Postponement of Preliminary Determination of Antidumping Duty Investigation: Certain Circular Welded Carbon Quality Line Pipe From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") is postponing the preliminary determination in the antidumping duty investigations of certain circular carbon quality line pipe from the People's Republic of China ("PRC") until no later than September 29, 2004. This postponement is made pursuant to section 733(c)(1)(B) of the Tariff Act of 1930, as amended ("the Act").

EFFECTIVE DATE: August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Steve Williams or Jim Nunno, at (202) 482–4619 or (202) 482–0783, respectively, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On March 23, 2004, the Department initiated antidumping duty investigations of imports of certain circular welded carbon quality line pipe ("line pipe") from Mexico, the Republic of Korea ("Korea"), and the PRC. *See* Notice of Initiation of Antidumping Duty Investigations: Certain Circular Welded Carbon Quality Line Pipe from Mexico, the Republic of Korea, and the People's Republic of China, 69 FR 16521 (March 30, 2004) ("Initiation Notice"). Section 733(b) of the Act requires the Department to make a preliminary determination no later than 140 days after the date of initiation. On July 21, 2004, the Department extended the preliminary determinations of the line pipe investigations for Mexico and Korea in accordance with section 733(c)(1)(B) of the Act. *See* Postponement of Preliminary Determinations of Antidumping Duty Investigations: Certain Circular Welded Carbon Quality Line Pipe from Mexico and the Republic of Korea 69 FR 44641 (July 27, 2004). The preliminary determinations in the investigation of line pipe with respect to Mexico and Korea are now due not later than September 29, 2004.

On August 5, 2004, the Department received a request from American Steel Pipe Division of ACIPC, IPSCO Tubulars Inc., Lone Star Steel Company, Maverick Tube Corporation, Northwest Pipe Company, and Stupp Corporation, petitioners in these investigations, a request for an extension of the preliminary determination with respect to line pipe from the PRC. *See* Letter from Petitioners requesting an extension of the preliminary determination on certain circular welded carbon quality line pipe from China, dated August 5, 2004 ("Extension Request").

Postponement of Preliminary Determinations

19 CFR 351.205(e) states that a petitioner can request a postponement of the preliminary determination 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Notification of such a postponement will be given by the Department no later than 20 days before the scheduled date of the preliminary determination. *See* 19 CFR 351.205(f).

Although the petitioners' request was filed beyond the deadline of 25 days and this notice to the parties is delayed, pursuant to 19 CFR 351.302(b), the Department "may, for good cause, extend any time limit established by this Part." In this instance, the

Department finds good cause to extend the time limit for notification of the extension of the preliminary determination for the reasons stated below.

To begin, the period of investigation ("POI") in the line pipe investigation of the PRC, a non-market economy ("NME"), is July 1, 2003, through December 31, 2003. In NME cases, the Department values data using prices from a comparable market economy that is a significant producer of comparable merchandise. However, the availability of such prices that are properly contemporaneous with the POI is limited at this time. The Department needs additional time in order for the Department to have contemporaneous information from a comparable market economy on the record to corroborate properly the secondary information to be used as the basis of the margin for the PRC entity.

In addition, as stated in the Extension Request, the U.S. International Trade Commission ("ITC") reached its affirmative preliminary injury determination for Mexico, Korea, and the PRC on May 3, 2004. Were the Department to proceed with its preliminary determination with respect to the PRC, it would be necessary that the ITC issue a separate final determination for the PRC, much earlier than with respect to Mexico and Korea. The petitioners in this investigation have requested that the Department align these cases at its preliminary determination to eliminate the necessity for separate ITC determinations. In the interest of administrative efficiency, the Department concludes that the Mexico, Korea, and PRC cases should remain on a consistent timeline.

For the reasons identified above, we are postponing the preliminary determinations under Section 733(c)(1)(A) of the Act by 50 days, to no later than September 29, 2004. The deadline for the final determinations will continue to be 75 days after the date of the preliminary determinations. This notice is issued and published pursuant to sections 733(f) and 777(i) of the Act.

Dated: August 6, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–18455 Filed 8–11–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–865]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Outboard Engines From Japan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value and postponement of final determination.

DATES: Effective August 12, 2004.

FOR FURTHER INFORMATION CONTACT: James Kemp or Shane Subler at (202) 482–5346 or (202) 482–0189, respectively; AD/CVD Enforcement Office 1, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that outboard engines from Japan are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are shown in the *Suspension of Liquidation* section of this notice. Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 135 days after the date of publication of this preliminary determination.

Case History

This investigation was initiated on January 28, 2004.[1] *See* Notice of Initiation of Antidumping Duty Investigation: Outboard Engines from Japan, 69 FR at 5316 (February 4, 2004) (Initiation Notice). Since the initiation of the investigation, the following events have occurred:

The Department of Commerce (the Department) set aside a period for all interested parties to raise issues regarding product coverage. *See* Initiation Notice, 69 FR at 5317. On February 24, 2004, the following companies submitted timely responses: American Honda Motor Co., Inc., and Honda Motor Co., Ltd. (Honda); Nissan Marine Co., Ltd. (Nissan); Suzuki Motor Corporation and American Suzuki Motor Corporation (Suzuki); Tohatsu Corporation, Tohatsu Marine Corporation, and Tohatsu America Corporation (Tohatsu); and Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, USA (Yamaha).

On February 3, 2004, the Department issued a letter providing interested parties an opportunity to comment on the Department's proposed model match characteristics and its hierarchy of characteristics. The petitioner submitted a timely response on February 20, 2004. Honda, Nissan, Suzuki, Tohatsu, and Yamaha also submitted comments on February 20, 2004. Bombardier Motor Corporation and Bombardier Recreational Products Inc. (Bombardier), a domestic interested party, submitted a timely response on February 27, 2004. Based on these comments, we determined the appropriate model match characteristics and included them in the antidumping questionnaire issued to Yamaha on March 11, 2004.

On February 23, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of the products subject to this investigation are materially injuring an industry in the United States producing the domestic like product. *See* Outboard Engines from Japan, 69 FR at 9643 (March 1, 2004) (ITC Preliminary Determination).

On April 30, 2004, the petitioner requested that the Department extend the preliminary determination in this investigation by 30 days. Because there were no compelling reasons to deny the request, we postponed the preliminary determination to July 16, 2004, under section 733(c)(1) of the Act. On June 22, 2004, the petitioner made an additional request to extend the preliminary deadline 20 days beyond the July 16, 2004, deadline. Once again, there were no compelling reasons to deny the request, and the Department made a second postponement of the preliminary determination to August 5, 2004.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise. Section 351.210(e)(2) of the

[1] The petitioner in this investigation is Mercury Marine, a division of Brunswick Corporation (Mercury).

Department's regulations requires that exporters requesting postponement of the final determination must also request an extension of the provisional measures referred to in section 733(d) of the Act from a four-month period until not more than six months. We received a request to postpone the final determination from the respondent, Yamaha. In its request, the respondent consented to the extension of provisional measures to no longer than six months. Since this preliminary determination is affirmative, the request for postponement is made by an exporter that accounts for a significant proportion of exports of the subject merchandise, and there is no compelling reason to deny the respondent's request, we have extended the deadline for issuance of the final determination until the 135th day after the date of publication of this preliminary determination in the **Federal Register** and have extended provisional measures to no longer than six months.

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Where it is not practicable to examine all known producers/exporters of subject merchandise, section 777A(c)(2) of the Act permits the Department to investigate either: (1) A sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined. In the petition, the petitioner identified six potential producers and exporters of outboard engines in Japan: Honda, Nissan, Suzuki, Tohatsu, Tohatsu Marine Corporation (TMC), and Yamaha. On March 4, 2004, Tohatsu placed information on the record indicating that Nissan is not a producer, although it exports engines produced by Tohatsu to the U.S. market.[2] Information placed on the record by the petitioner indicated that it was appropriate to treat Tohatsu and TMC as a single entity.[3]

On March 1, 2004, the Department requested information on the total quantity and value of subject merchandise exported to the United States during the period of investigation (POI), and the total quantity and value of subject merchandise sold in the United States during the POI, by the Japanese producers and exporters of the subject merchandise. On March 4, 2004, the Department received timely responses from Honda, Nissan, Suzuki, Tohatsu, and Yamaha. For selecting respondents, the Department considered these statistics and statistics from U.S. Customs and Border Protection (CBP). Using these data, we selected Yamaha as the mandatory respondent.[4] On March 11, 2004, the Department issued an antidumping questionnaire to Yamaha.

Period of Investigation

The POI is January 1, 2003, through December 31, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of filing of the petition (*i.e.*, January, 2004) involving imports from a market economy, and is in accordance with our regulations. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

For the purpose of this investigation, the products covered are outboard engines (also referred to as outboard motors), whether assembled or unassembled; and powerheads, whether assembled or unassembled. The subject engines are gasoline-powered spark-ignition, internal combustion engines designed and used principally for marine propulsion for all types of light recreational and commercial boats, including, but not limited to, canoes, rafts, inflatable, sail and pontoon boats. Specifically included in this scope are two-stroke, direct injection two-stroke, and four-stroke outboard engines.

Outboard engines are comprised of (1) a powerhead assembly, or an internal combustion engine, (2) a midsection assembly, by which the outboard engine is attached to the vehicle it propels, and (3) a gearcase assembly, which typically includes a transmission and propeller shaft, and may or may not include a propeller. To the extent that these components are imported together, but unassembled, they collectively are covered within the scope of this investigation. An "unassembled" outboard engine consists of a powerhead as defined below, and any other parts imported with the powerhead that may be used in the assembly of an outboard engine.

Powerheads are comprised of, at a minimum, (1) a cylinder block, (2) pistons, (3) connecting rods, and (4) a crankshaft. Importation of these four components together, whether assembled or unassembled, and whether or not accompanied by additional components, constitute a powerhead for purposes of this investigation. An "unassembled" powerhead consists of, at a minimum, the four powerhead components listed above, and any other parts imported with it that may be used in the assembly of a powerhead.

The scope does not include parts or components (other than powerheads) imported separately.

The outboard engines and powerheads subject to this investigation are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 8407.21.0040 and 8407.21.0080. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Scope Issues

In the Initiation Notice, we invited all interested parties to raise issues and comment regarding the product coverage under the scope of this investigation. We received comments from Honda, Nissan, Suzuki, Tohatsu, and Yamaha and rebuttal comments from the petitioner. We have preliminarily determined to continue to include engines under 25 horsepower (hp) and powerheads sold as spare parts in the scope of the investigation. We have also preliminarily determined that powerheads and completed engines constitute a single class or kind of merchandise.

Outboard Engines Under 25 Horsepower

Tohatsu requested that the scope of the investigation be revised to exclude all outboard engines under 25 hp. Tohatsu argues that the Department has the authority to both limit and expand the scope of an investigation proposed in a petition.[5] Tohatsu maintains that domestic producers import all or, if not all, the vast majority of their engines under 25 hp. According to Tohatsu, the petitioner purchases the vast majority of its under 25 hp line from its Japanese joint venture, Tohatsu Marine Corporation. The remainder of the petitioner's under 25 hp line consists of either limited domestic production or outboard engines assembled from powerheads imported from Japan.

Further, Tohatsu argues, the emission standards established by the U.S. Environmental Protection Agency

[2] *See* letter from Tohatsu to the Department, dated March 4, 2004, at Exhibit 1.

[3] *See* letter from Mercury to the Department, dated February 27, 2004, at page 2.

[4] *See* memo from Shane Subler, International Trade Compliance Analyst, to Gary Taverman, Director of Office 5, RE: Selection of Respondents, dated March 11, 2004.

[5] *See, e.g., Mitsubishi Elec. Corp* v. *United States*, 700 F. Supp. 538, 555 (CIT 1988), *aff'd* 898 F.2d 1577 (Fed. Cir. 1990).

(EPA), which mandate that outboard motor manufacturers reduce their average emissions in each year from the 1998 through 2005 model years, will prevent the petitioner from manufacturing two-stroke carbureted engines under 25 hp after 2006. Tohatsu maintains that this would leave the U.S. customers of these engines no choice but to buy an imported motor on which antidumping duties have been imposed.

Finally, Tohatsu argues that small horsepower engines do not compete with large engines. According to Tohatsu, engines under 25 hp are lightweight, portable, hand-throttle models which do not require special factory or dealer-installed rigging. They are used primarily for inflatable dinghies and small boats, or as the auxiliary power source for sailboats. Large engines, Tohatsu states, are not portable, require specialized rigging, and are used as the main power source for larger boats and specialty boats where speed is required. Tohatsu believes that this lack of interchangeability supports excluding engines under 25 hp from the scope of the investigation.

The petitioner states that outboard engines under 25 hp unambiguously come within the literal terms of the petition.[6] The petitioner also argues that the Department gives "ample deference to the petitioners on the definition of the product for which they seek relief."[7] Although the petitioner concedes that the Department has the ultimate authority to define the scope of the investigation, it generally does not alter the petitioner's scope definition except to clarify ambiguities in the language or address administrability problems.[8]

The petitioner states that Mercury does produce domestically a range of engines under 25 hp. However, the petitioner notes that it is not necessary that the domestic industry produce products identical to every item imported or to every single segment of the subject merchandise continuum. Further, the petitioner contends that Tohatsu's argument that 2-stroke carbureted engines will not be available for sale after 2005 due to EPA regulations is incorrect. The petitioner states that the EPA regulations impose emission standard levels on outboard engines, but do not prohibit specific technologies.

In addition, the petitioner contends that outboard motors under 25 hp do compete with other engines. The petitioner argues that a 25 hp engine competes with both 20 and 30 hp engines, and that there is no clear dividing line at 25 hp that would merit making it a cut-off point for the purpose of excluding engines from the scope of the investigation.

Analysis

When the Department receives a petition that meets the requirements of the statute, it must initiate an investigation[9] and, if warranted by the evidence, provide the relief requested.[10] The starting place for determining the merchandise that is to be the subject of an investigation is the petition itself.[11] While the Department does have the authority to define or clarify the scope of an investigation,[12] it does not use its authority to define the scope of an investigation in a manner that would thwart the statutory mandate to provide the relief requested in the petition. As a result, absent an "overarching reason to modify" the scope in the petition, the Department accepts it.[13]

Engines having 25 hp or less clearly meet the definition of covered merchandise in that the scope makes no limitation on horsepower. Further, we agree with the petitioner that it is not necessary that the domestic industry produce all products covered by the scope. We note, however, that Mercury has placed evidence on the record indicating that it does produce certain engines under 25 hp. Therefore, since the scope language of this case clearly includes engines of 25 hp or less, we continue to include them in the scope of the investigation.

Powerheads Imported as Replacement Parts

Honda and Suzuki requested that powerheads imported as spare parts solely for the purpose of repairing outboard engines previously sold by the same manufacturer be excluded from the scope of the investigation. Both Honda and Suzuki emphasize that they import a limited number of powerheads for this purpose. Suzuki states that, with most of these imports, the cost of the powerhead was reimbursed as a warranty cost. Honda states it does not have any "sale" prices for these units, as they were used almost exclusively to satisfy warranty claims.

The petitioner argues that the Department should deny Honda and Suzuki's request to exclude powerheads from the scope of the investigation based on their intended use. According to the petitioner, the proposed exclusion would be impossible to monitor and would present an obvious means of circumventing the order. To the extent the companies do not have sale prices for these units, the petitioner suggests that the Department could excuse respondents from reporting these units if the imports are indeed very limited. The petitioner asserts, however, that these units should not be excluded from the scope.

Analysis

As discussed above, absent an "overarching reason to modify" the scope in the petition, the Department accepts it. In the instant case, the scope specifically includes powerheads. Attempting to exclude certain powerheads from the scope of the investigation based on usage would cause significant administrability problems for CBP, should an antidumping duty order ensue. Therefore, we continue to include all powerheads in the scope of the investigation, regardless of the reason for importation.

Treatment of Powerheads as a Separate Class or Kind

The term "class or kind" is equated with the term "subject merchandise" at section 771(25) of the Act. (This provision defines subject merchandise as the class or kind of merchandise within the scope of an investigation or other proceeding covered by the statute.) The Department bases its determination of whether the merchandise, as described in the scope of a proceeding, constitutes a single class or kind of merchandise on an evaluation of the criteria set forth in *Diversified Products* v. *United States*, 572 F. Supp. 883, 889 (CIT 1983) (Diversified Products), which look to differences in: (1) The general physical characteristics of the merchandise, (2) the expectations of the ultimate

[6] *See* letter from the petitioner to the Department, dated March 11, 2004, at page 3.

[7] *See* Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan, 65 FR at 42985 (July 12, 2000) and Accompanying Issues and Decision Memorandum.

[8] *See, e.g.*, id. at 42985.

[9] Sections 702(c)(2) and 732(a)(1) of the Act.

[10] Section 731(1) of the Act. The relief sought would apply to all subject merchandise that is within the scope of the investigations. *See* section 731(2) of the Act.

[11] *See* 19 CFR 351.225(k)(1) (2001). *See also Eckstrom Industries, Inc.* v. *United States*, 254 F.3d 1068, 1071–72 (Fed. Cir. 2001) (citing *Smith Corona Corp.* v. *United States*, 915 F.2d 683, 685 (Fed. Cir. 1990)).

[12] *See* generally Final Determination of Sales at Less Than Fair Value: Certain Carbon Alloy Steel Wire Rod from Japan, Comment 1, 59 FR at 5987, 5988–5989 (Feb. 9, 1994).

[13] *See* Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR at 15539 (April 2, 2002) and Accompanying Issues and Decision Memorandum at Comment 51; *see also* 19 CFR 351.225(k) (2001).

purchaser, (3) the ultimate use of the merchandise, (4) the channels of trade in which the merchandise moves, and (5) the manner in which the product is advertised or displayed. Both parties addressed the Diversified Products criteria.

Yamaha argues that powerheads should be treated as a separate class or kind from completed engines, and that powerheads should be excluded from the scope of the investigation. According to Yamaha, the Department's practice has been to treat sub-assemblies and semi-finished products as a separate class or kind.[14]

The petitioner rebuts that the Department has included less than complete merchandise within the scope of the investigation with complete merchandise in numerous cases, and has not determined less than complete and complete merchandise to be separate classes or kinds.[15]

A. Physical Characteristics

Yamaha maintains that powerheads have distinct physical characteristics from finished outboard motors in that the components making up a powerhead constitute a small portion of the overall parts and systems incorporated within a finished engine. Yamaha states that "according to the petition, powerheads consist of the cylinder block, pistons, connecting rods and the crankshaft."[16]

The petitioner argues that the general physical characteristics of both powerheads and outboard engines are very similar. The outboard engine, the petitioner points out, contains all the physical characteristics of the powerhead, which is the "engine" part of an outboard engine. Further, the petitioner states that the scope of the investigation defines the minimum defining characteristics of a powerhead. A powerhead may also include additional components. The petitioner contends that the powerheads covered in the scope of the investigation include assemblies that consist of a significant percentage of a completed outboard engine. For this reason, the petitioner maintains that there is a significant overlap in the general physical characteristics of powerheads and outboard engines, and no clear dividing line exists.

B. Expectations and End-Uses by the Ultimate Customer

According to Yamaha, the ultimate purchaser of a finished engine is the consumer who buys the engine as part of a boat package and intends to use that engine to power the boat. The ultimate purchasers of powerheads are outboard motor manufacturers, who intend to incorporate this component into their own engines. Because of the large degree of further manufacturing necessary to convert a powerhead to a finished engine, these two products are not interchangeable—a customer could not buy a powerhead to use as the propulsion system on a boat. Therefore, Yamaha maintains that the products have entirely different end-users and, as a result, different expectations among the particular end-users.

The petitioner maintains that there is almost complete overlap in the end uses of outboard engines and powerheads. Outboard engines are used to propel a boat; powerheads are used to provide power to the outboard engine in order to propel a boat. According to the petitioner, because every outboard engine contains a powerhead, the end uses are the same. The petitioner concedes that a powerhead alone cannot propel a boat, but finds this fact irrelevant because a powerhead has no end use unless it is propelling a boat as part of an outboard engine. Further, the petitioner points out that powerhead failure is not uncommon, and when it happens, the boat owner is faced with a decision of whether to buy a powerhead or a completely new engine. According to the petitioner, the expectation of that customer, whether he decides to buy a powerhead or a completely new engine, is that the non-functional outboard engine will be replaced with a functional outboard engine capable of providing propulsion to the boat.

C. Channels of Trade

Because they have completely different purchasers, Yamaha argues, powerheads and finished engines of necessity have completely different channels of trade. Powerheads are sold to manufacturers; finished engines are sold to customers buying a boat package. Yamaha maintains that there are consequently different costs associated with each of these channels as a great deal of marketing and sales expenditures are required to sell finished engines to the retailers and dealers which are the ultimate customers. Powerheads have a limited number of customers and require much less in the way of marketing and selling expenses.

The petitioner points out that in its Section A response, Yamaha stated that the channels of distribution for powerheads are identical to those for outboard motors. See Yamaha's Section A questionnaire response dated May 18, 2004, at page A–28. In addition, for sales of powerheads in the U.S. market, Yamaha stated that there is only one channel of distribution for powerheads—dealer distribution. See id. at page A–29. Therefore, the petitioner concludes that there is ample evidence on the record that powerheads and outboard engines are sold through the same channels of trade in both the U.S. and home markets.

D. Manner of Advertising

With respect to powerheads, Yamaha states that when there is only one customer, such as the petitioner, it is not necessary to incur excessive selling and marketing expenses. Finished motors, on the other hand, require a great deal of additional expenses to market and advertise because there is an extremely large customer base. Yamaha explains that various forms of print and television advertising are necessary to advertise the finished outboard engine and boat package, whereas there is virtually no advertising necessary to sell powerheads to outboard engine manufactures.

The petitioner contends that while there is essentially no advertising of powerheads alone, the advertising for powerhead sales is subsumed within the advertising for the outboard engine. If a company's advertising for completed engines persuades a customer to purchase its brand of outboard motor, it creates a captive market for its powerheads in that the customer must come back to the manufacturer to purchase a replacement powerhead should the engine fail. This subtle difference in advertising, the petitioner maintains, is not sufficient to outweigh the significant overlap among the other four diversified product criteria.

Analysis

We analyzed this issue based on the criteria set forth by the CIT in *Diversified Products*.

A. Physical Characteristics

The powerhead, which provides the motive force to an outboard engine, is a major component of the finished product, and thus shares its primary physical characteristics. Additionally, in deciding whether physical

[14] *See, e.g.*, Color Picture Tubes from Canada, Japan, Republic of Korea and Singapore; Negative Final Determinations of Circumvention of Antidumping Duty Orders, 56FR at 9667, (March 7, 1991); Final Determinations of Sales at Less Than Fair Value: Certain Alloy and Carbon Hot-Rolled Bars, Rods, and Semifinished Products of Special Bar Quality Engineered Steel from Brazil, 58 FR at 31496 (June 3, 1993) (Hot-Rolled Steel from Brazil).

[15] *See, e.g.*, Mechanical Transfer Presses From Japan: Final Results of Antidumping Duty Administrative Review, 68 at 39515 (July 2, 2003).

[16] *See* letter from Yamaha to the Department, dated February 24, 2004, at page 5.

differences in merchandise rise to the level of a class or kind distinction, the Department looks for a clear dividing line between product groups, not merely the presence or absence of physical differences.[17] The scope of this investigation defines the minimum components which make up a powerhead—cylinder block, pistons, connecting rods and the crankshaft. It does not, however, define a limit for the maximum number of additional parts which can be added to the powerhead before it ceases to be properly categorized as a powerhead and becomes an outboard engine. The petition lists other components which may be attached to the four basic elements of a powerhead, such as a starter; alternator; flywheel ignition system; flywheel; stator or ECU (programmable); carburetors; electrical harness; electrical plate assembly and electrical harness; oil pump; throttle linkages; battery cables and connections; and spark plugs.[18] Presumably, other components could be added to a powerhead to the point where it might be more properly classified as an outboard engine. Consequently, we find that a clear dividing line between powerheads and completed outboard engines does not exist. For these reasons, we preliminarily determine that the differences in physical characteristics between powerheads and outboard engines are not significant.

We note that in developing the model matching criteria to be used in this investigation, all parties agree that products should be classified as either powerheads or complete engines. Yamaha's classification of its products into those categories has not been contested. Nevertheless, this cannot be construed to mean that a clear dividing line exists for all manufacturers in all situations.

B. Expectations and End-Uses by the Ultimate Customer

Completed outboard engines are unquestionably used to power boats. Powerheads are fitted into outboard engines either by engine manufacturers making new engines or by engine repair facilities using the powerhead as a replacement part. Although the powerhead cannot be used by itself to power a boat, both the engine manufacturers and engine repair facilities expect that, after installation, the powerhead will be capable of powering the boat. The finished engine gets its propulsion from the powerhead.

In contrast to Hot-Rolled Steel from Brazil, where the Department found that the semi-finished products, hot-rolled bars and rods, "have numerous ultimate uses, including machining, forging, and hot- and cold-forming," and that "consumers of hot-rolled bars and rods expect a product which meets relatively exacting tolerances, while consumers of semifinished products do not require such exacting specifications,"[19] we find that the powerheads in this case have only one use—to be incorporated into a completed outboard engine and used to propel a boat. Further, the standards to which the powerhead is produced determine into which specific type of engine it will be incorporated. These standards also determine what level of power the consumer, be it an engine manufacturer, a boat-builder, or a boat owner, can expect from that engine.

C. Channels of Trade

Powerheads are sold primarily to engine manufacturers, a different customer category than the boat manufacturers, dealers and distributors which purchase completed engines. When powerheads are sold as spare or replacement parts, they also are sold to boat manufacturers, dealers, and distributors. With regard to the petitioner's cites to Yamaha's response, we note that in both the U.S. and home market, Yamaha was referring to its sales of powerheads as spare and replacement parts. The majority of Yamaha's sales of powerheads are going to engine manufacturers. There is no evidence on the record that this is not typical for the industry. Therefore, it appears that the majority of powerhead sales are made via a different channel of trade from that of completed outboard engines.

D. Manner of Advertising

Both parties agree that powerheads are not advertised directly. The advertising which does occur in the industry is for the completed engine and is often aimed at the boat owner. Yamaha has indicated that some of the advertising is for the "boat package."[20] This would indicate that the completed engine, a component of the boat package, benefits from the advertising for the whole package. Powerheads can be assumed to receive at least some benefit from the advertising done for the completed engine, to the extent the customers are convinced that the features the powerhead contributes to the final engine are desirable. However, we note that if a powerhead goes into an engine which is subsequently marketed under another manufacturer's name, this advertising benefit is largely eliminated. Therefore, there appears to be little similarity in the manner of advertising between powerheads and completed engines.

Conclusion

As an initial matter, we disagree with Yamaha that it is the Department's practice to treat subassemblies of finished products as a separate class or kind. The Department has a large number of cases where a petition was filed on products and their major components, in which they were treated as a single class or kind.[21] Further, we find Yamaha's reference to Color Picture Tubes to be off-point, as the order in question did not cover completed color televisions.

In analyzing the Diversified Products criteria, we find that the similarities in physical characteristics, end uses, and the expectations of the ultimate purchaser outweigh differences in channels of trade and advertising. The powerhead is a defining characteristic of the completed engine, and there is no clear dividing line between the two. We note that because we have determined that powerheads and completed outboard engines constitute a single class or kind of merchandise, Yamaha's comment regarding removing powerheads from the scope becomes moot.

Yamaha's Sales to Mercury

Yamaha reported sales of certain powerhead models to Mercury's affiliate in Japan, Mercury Marine Japan, as U.S. sales. Yamaha assists Mercury in shipping these models to the United States. Therefore, Yamaha has knowledge that the United States is the final destination of the merchandise. However, for sales of other models of

[17] *See* Final Affirmative Less Than Fair Value Determination: Sulfur Dyes, Including Vat Sulfur Dyes, from the U.K., 58 FR at 3253 (January 8, 1993); see also, Notice of Final Determinations of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan; and Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and the Republic of South Africa, 65 FR at 25907 (May 4, 2000) and the Accompanying Issues and Decision Memorandum at Comment 1.

[18] *See* Petition for the Imposition of Antidumping Duties: Outboard Engines from Japan at Exhibit I–1.

[19] *See* Hot-Rolled Steel from Brazil at 31496.

[20] *See* letter from Yamaha to the Department, dated February 24, 2004, at page 7.

[21] *See, e.g.*, Notice of Initiation: Floor-Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China, 68 FR at 44040 (July 25, 2003); Final Results of Change Circumstances Review, Revocation of the Antidumping Duty Order, and Rescission of Administrative Reviews: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany, 67 FR at 53996 (April 22, 2002).

engines and powerheads to Mercury Marine Japan, Yamaha states that it relinquishes the title to the product when it arrives at the Japanese port. Yamaha, therefore, asserts that it has no knowledge of the final destination of this merchandise and classified these sales as home market sales. As support for this classification, Yamaha points to Mercury's plants in Belgium and Mexico as evidence that the merchandise may go elsewhere than the United States for further processing. Although Yamaha is not aware of any Mercury plants in Japan that could process powerheads into outboard engines, it does claim that Mercury sells finished engines containing the powerheads in question in Japan. Furthermore, Yamaha notes that Mercury has sales outside of the United States of engines built from the powerhead models in question.[22]

In response to Yamaha's classification of these sales as home market sales, Mercury submitted an affidavit [23] stating that all of the powerheads and engines purchased by Mercury Marine Japan from Yamaha had to undergo further processing at Mercury's Wisconsin plant. Mercury claims that all of the engines and powerheads sold by Yamaha to Mercury were exported directly from Japan to the United States for processing at this plant. The affidavit also states that Mercury's plant in Mexico only produces components for outboard engines, and that its plant in Belgium has never received powerheads or engines directly from Yamaha. The submission attached to the affidavit states that neither plant manufactures or further processes the subject merchandise. The affidavit also claims that Yamaha officials have toured these two plants and are aware of the plants' functions.

Although Yamaha acknowledges that one of its officials toured the Mercury plant in Belgium, Yamaha claims to have no specific knowledge of Mercury's manufacturing and shipping process at this plant.[24] Yamaha also notes that Mercury sells completed engine units containing the powerhead models in question outside of the United States. Furthermore, Yamaha suggests that Mercury could import the powerheads into the United States under a temporary importation bond or send them to a bonded warehouse or foreign trade zone.[25] Mercury could then further manufacture the powerheads and re-export them to a third country. Under these circumstances, Yamaha argues, the powerheads would not be entering the United States for customs purposes.

The Department has interpreted the phrase "for exportation to the United States" in section 772(b) of the statute to mean that the reseller or manufacturer from whom merchandise was purchased knew or should have known at time of sale that merchandise was being exported to the United States. *See LG Semicon* v. *United States*, 23 CIT 1074 (December 30, 1999). Based on evidence placed on the record, we preliminarily determine that Yamaha knew or should have known that the powerheads it sold to Mercury were being exported directly to the United States. These sales should, therefore, be classified as U.S. sales.

Bombardier placed the U.S. Securities and Exchange Commission's Form 10–K report for Brunswick Corporation, Mercury's parent company, on the record of this case.[26] The document states, "Mercury Marine also manufactures engine component parts at plants in Florida and Mexico, and has a facility in Belgium that customizes engines for sale into Europe." Furthermore, Mercury's Web site describes the Mexican plant's function as the "manufacture of wire harnesses, remote controls for Quiksilver, miscellaneous electrical assemblies for engines and spare parts, and machining operation for the outboard business unit." [27] This publicly available information, combined with Yamaha's tours of these plants, indicates Yamaha knew or should have known that the powerheads it sold to Mercury Marine Japan were to be exported to the United States, the only location where Mercury could process the powerheads into completed outboard engines. Information placed on the record by Yamaha does not support its contention that it had no specific knowledge of Mercury's manufacturing process at the plant in Belgium.[28]

Yamaha's argument that Mercury had sales outside of the United States of engines that are built from the powerhead models in question does not change our analysis that Yamaha knew or should have known the destination of the powerheads. The first sale of the powerheads is from Yamaha to Mercury. We have based our analysis on this sale. The sale of complete engines from Mercury to the ultimate purchasers occurs after the powerheads have undergone the requisite further manufacturing at Mercury's Wisconsin plant. Because the powerheads must go directly to the Wisconsin plant after Yamaha sells them to Mercury, the sale of the complete engine by Mercury to the ultimate purchaser did not affect our analysis. With regard to Yamaha's argument that Mercury may import the powerheads under a temporary import bond or to a bonded warehouse or foreign trade zone, we note that the duty rate for powerheads during the period of investigation was zero. Therefore, Mercury would have had little reason to import the powerheads under a temporary import bond or to a bonded warehouse or foreign trade zone.

For these reasons, we preliminarily determine that Yamaha knew or should have known that these sales were to be exported to the United States. As a result, we have moved all of Yamaha's sales of powerheads to Mercury from its home market database to its U.S. database.

For outboard engines sold by Yamaha to Mercury Marine Japan, however, there is no compelling reason to believe Yamaha knew or should have known that these engines were destined for the United States. Yamaha acknowledges that this merchandise is packed for export. This does not, however, indicate that all of these sales were exported to the United States. Although Mercury indicated that all of these engines were exported to the Wisconsin plant for further processing, it is reasonable to believe that a finished engine could be sold directly in Japan or to a third country. Without evidence that Yamaha knew or should have known these exports were destined for the United States, we preliminarily determine that these sales should be excluded from our analysis.

Fair Value Comparisons

To determine whether sales of outboard engines were made in the United States at LTFV, we compared the export price (EP) and the constructed export price (CEP) to the normal value (NV), as described in the *Export Price and Constructed Export Price* and *Normal Value* sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs and

[22] *See* Yamaha's second supplemental Sections A, B, and C questionnaire response, dated July 22, 2004, at page 2.

[23] *See* letter from Mercury to the Department, dated June 29, 2004.

[24] *See* Yamaha's second supplemental Sections A, B, and C questionnaire response, dated July 22, 2004, at page 2.

[25] *See id.* at page 3.

[26] *See* letter from Bombardier to the Department, dated May 27, 2004, at Attachment 1.

[27] *See* memorandum from Shane Subler, International Trade Compliance Analyst, to file, Re: Mercury's Web site Description of its Juarez, Mexico Plant, dated August 5, 2004.

[28] *See* Yamaha's second supplemental Sections A, B, and C questionnaire response, dated July 22, 2004, at Exhibit 2.

CEPs. We compared these to weighted-average home market prices in Japan.

The date of sale on which we based our comparisons depended on the market. For all of Yamaha's home market sales, Yamaha Motor Marketing Japan Co., Ltd. (YMMJ) issues monthly sales invoices to its customers. Yamaha reported the date of shipment as either before or equal to the invoice date. In keeping with Department practice, we used the date of shipment as the date of sale for all home market sales.[29] In the U.S. market, we used the invoice date as the date of sale for the majority of transactions. However, some U.S. sales have a shipment date that precedes the invoice date. For these sales, we determined that date of shipment is the most appropriate date of sale. For sales of powerheads to Mercury, we found that the shipment date was the appropriate date of sale.

Export Price and Constructed Export Price

For the price to the United States, we used, as appropriate, EP or CEP, as defined in sections 772(a) and 772(b) of the Act, respectively. Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold before the date of importation by the producer or exporter outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection 772(c) of the Act.

Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections 772(c) and (d) of the Act.

Certain sales by Yamaha are properly classified as EP sales because they were made outside the United States by the exporter or producer to an unaffiliated customer in the United States prior to the date of importation. The remainder of Yamaha's sales are properly classified as CEP sales because they were made for the account of Yamaha, by Yamaha's U.S. affiliate, Yamaha Motor Corporation, USA, to unaffiliated purchasers in the United States.

In accordance with section 772(c)(2) of the Act, for both EP and CEP sales, we made deductions from the starting price for movement expenses, discounts, billing adjustments, and rebates, where appropriate.

After reviewing the terms of delivery for EP sales to Mercury, we deducted foreign inland freight from the gross price, where appropriate. For EP sales to Puerto Rico, the deductions for movement expenses depended on the circumstances of the transaction. For direct sales to Puerto Rico, we deducted only foreign inland freight and foreign brokerage, handling, and port charges. For all other sales to Puerto Rico, we deducted foreign inland freight; foreign brokerage, handling, and port charges; international freight and insurance; U.S. brokerage, handling, and port charges; U.S. warehousing; and U.S. inland freight. For CEP sales, movement expenses included foreign inland freight and insurance; foreign warehousing; foreign brokerage, handling, and port charges; international freight and insurance; U.S. inland freight and insurance; U.S. warehousing; and U.S. brokerage, handling, and port charges.

Section 772(d)(1) of the Act provides for additional adjustments to calculate CEP. Accordingly, where appropriate, we deducted direct selling expenses and indirect selling expenses related to commercial activity in the United States. Pursuant to section 772(d)(3) of the Act, where applicable, we made an adjustment for CEP profit.

In addition to these adjustments, we recalculated credit expense for sales that had no reported pay dates. For all such sales, we used the date of this preliminary determination as date of payment for the merchandise. See the Memorandum from James Kemp and Shane Subler, International Trade Compliance Analysts, to the File, Re: Analysis Memorandum for Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, USA, dated August 5, 2004 (Analysis Memorandum).

Normal Value

A. Selection of Comparison Markets

Section 773(a)(1) of the Act directs the Department to calculate NV based on the price at which the foreign like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate), and that there is no particular market situation that prevents a proper comparison with the EP or CEP. Under the statute, the Department will normally consider quantity (or value) insufficient if it is less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States. We found that Yamaha had a viable home market for outboard engines. As such, Yamaha submitted home market sales data for the calculation of NV.

In deriving NV, we made adjustments as detailed in the following *Calculation of Normal Value Based on Home Market Prices* section.

B. Cost of Production Analysis

Based on allegations contained in the petition, and in accordance with section 773(b)(2)(A)(i) of the Act, we found reasonable grounds to believe or suspect that outboard engine sales were made in Japan at prices below the cost of production (COP). See Initiation Notice, 69 FR at 5318. As a result, the Department has conducted an investigation to determine whether Yamaha made home market sales at prices below their respective COPs during the POI within the meaning of section 773(b) of the Act. We conducted the COP analysis described below.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated a weighted-average COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for the home market G&A expenses, including interest expenses, and packing expenses. We relied on the COP data submitted by Yamaha in its cost questionnaire responses.

2. Test of Home Market Sales Prices

We compared the weighted-average COP for Yamaha to its home-market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below the COP within an extended period of time (*i.e.*, a period of one year) in substantial quantities and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time.

On a model-specific basis, we compared the revised COP to the home market prices, less any applicable movement charges, discounts, rebates, and direct and indirect selling expenses.

3. Results of the COP Test

We disregarded below-cost sales where (1) 20 percent or more of Yamaha's sales of a given product during the POI were made at prices below the COP, and thus such sales were made within an extended period of time in substantial quantities in

[29] *See, e.g.*, Synthetic Indigo From the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value, 65 FR 25706 (May 3, 2000) and accompanying Decision Memorandum at Comment 11; Final Results of Antidumping Administrative Review: Stainless Steel Bar From Japan, 65 FR 13717 (March 14, 2000) and accompanying Decision Memorandum at Comment 1.

accordance with sections 773(b)(2)(B) and (C) of the Act, and (2) based on comparisons of price to weighted-average COPs for the POI, we determined that the below-cost sales of the product were at prices which would not permit recovery of all costs within a reasonable time period, in accordance with section 773(b)(2)(D) of the Act. We found that Yamaha made sales below cost and we disregarded such sales where appropriate.

C. Calculation of Normal Value Based on Home Market Prices

We determined NV for Yamaha as follows. We made adjustments for any differences in packing and deducted home market movement expenses, rebates, and discounts pursuant to sections 773(a)(6)(A) and 773(a)(6)(B)(ii) of the Act. In addition, where applicable in comparison to EP transactions, we made adjustments for differences in circumstances of sale (COS) pursuant to section 773(a)(6)(C)(iii) of the Act. We made COS adjustments for Yamaha's EP transactions by deducting direct selling expenses incurred for home market sales (*e.g.*, credit expense and warranty expenses) and adding U.S. direct selling expenses (*e.g.*, credit expenses).

In addition to these adjustments, we disregarded certain sales in the home market database because the merchandise was produced in France. *See* Analysis Memorandum.

D. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that, where NV cannot be based on comparison-market sales, NV may be based on CV. Accordingly, for those models of outboard engines for which we could not determine the NV based on comparison-market sales, either because there were no useable sales of a comparable product or all sales of the comparable products failed the COP test, we based NV on CV.

Section 773(e) of the Act provides that the CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for selling, general and administrative (SG&A) expenses, profit, and U.S. packing costs. We calculated the cost of materials and fabrication based on the methodology described in the *Cost of Production Analysis* section, above. We based SG&A and profit on the actual amounts incurred and realized by Yamaha in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act. We used U.S. packing costs as described in the *Export Price and Constructed Export Price* section, above.

We made adjustments to CV for differences in COS in accordance with section 773(a)(8) of the Act and 19 CFR 351.410. For comparisons to EP, we made COS adjustments by deducting direct selling expenses incurred on home-market sales from, and adding U.S. direct selling expenses to, CV. For comparisons to CEP, we made COS adjustments by deducting from CV direct selling expenses incurred on home-market sales.

E. Level of Trade/Constructed Export Price Offset

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade as the EP transaction. The NV level of trade is that of the starting-price sales in the comparison market. For EP sales, the U.S. level of trade is also the level of the starting-price sale, which is usually from exporter to importer.

To determine whether comparison market sales are at a different level of trade than EP transactions, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different level of trade and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act.

In implementing these principles in this investigation, we obtained information from Yamaha about the marketing stages involved in the reported U.S. and home market sales, including a description of the selling activities performed by the respondent for each channel of distribution. In identifying levels of trade for EP and home market sales, we considered the selling functions reflected in the starting price before any adjustments.

In conducting our level-of-trade analysis for Yamaha, we examined the specific types of customers, the channels of distribution, and the selling practices of the respondent. Generally, if the reported levels of trade are the same, the functions and activities of the seller should be similar. Conversely, if a party reports levels of trade that are different for different categories of sales, the functions and activities may be dissimilar. We found the following.

Yamaha reported three channels of distribution in the home market: (1) Sales to distributors (HM2); (2) sales to dealers (HM3); and (3) sales to Mercury. For purposes of the preliminary determination, we disregarded the sales made to Mercury and did not consider such sales in our level of trade analysis. See *Yamaha's Sales to Mercury* above.

To determine whether HM2 and HM3 constitute separate levels of trade in the home market, we examined the marketing process and selling functions to these two types of customers. We find that sales made to dealers are at a more remote marketing stage than that for sales to distributors. We also find that sales to dealers require more intensive selling activities. Based on this examination, we preliminarily determine that Yamaha sold merchandise at two levels of trade in the home market during the POI. One level of trade is for sales made by Yamaha to distributors (HM2), and the second level of trade is for sales made by Yamaha to dealers (HM3). For a more detailed discussion of Yamaha's levels of trade, see Analysis Memorandum.

In the U.S. market, Yamaha reported two EP channels of distribution: (1) Direct sales by Yamaha to Mercury (US1) and (2) direct sales to a distributor in Puerto Rico (US2). To determine whether separate levels of trade exist for EP sales to the U.S. market, we examined the selling functions, the chain of distribution, and the customer categories reported in the United States.

For Yamaha's sales to Mercury, the questionnaire response indicates that the respondent conducted invoice/order processing for the transactions and in some instances made freight arrangements. Nevertheless, we concluded that there were few selling activities undertaken to support these sales. Further, comparing Yamaha's sales to Mercury to Yamaha's home market sales, we find that there is no level of trade in the home market that corresponds to Yamaha's sales to Mercury. Therefore, for Yamaha's EP sales to Mercury (US1), we first attempted to match to the closest home market level of trade (HM2).

For Yamaha's EP sales to the distributor in Puerto Rico, we found that the number and degree of selling functions closely correspond to Yamaha's sales to distributors in the home market. Thus, we determined that these two channels of distribution are at the same level of trade. For a more detailed discussion of the selling functions corresponding to levels of trade for sales to the distributor in

Puerto Rico, *see* Analysis Memorandum. To the extent possible, we compared Yamaha's EP sales to Puerto Rico to home market sales at the same level of trade, HM2.

When we were unable to find sales of the foreign like product in the home market at the same level of trade as the U.S. sales, we examined whether a level-of-trade adjustment was appropriate. When we compare U.S. sales to home market sales at a different level of trade, we make a level-of-trade adjustment if the difference in levels of trade affects price comparability. We determine any effect on price comparability by examining sales at different levels of trade in a single market, the home market. Any price effect must be manifested in a pattern of consistent price differences between home market sales used for comparison and sales at the equivalent level of trade of the export transaction. To quantify the price differences, we calculate the difference in the average of the net prices of the same models sold at different levels of trade. Net prices are used because any difference will be due to differences in level of trade rather than other factors. We use the average difference in net prices to adjust NV when NV is based on a level of trade different from that of the export sale. If there is no pattern of consistent price differences, the difference in levels of trade does not have a price effect and, therefore, no adjustment is necessary.

We found that there were consistent price differences between sales to HM2 and HM3. Therefore, we made a level-of-trade adjustment when we were forced to compare Yamaha's EP sales to Puerto Rico to Yamaha's sales at HM3. However, for Yamaha's U.S. sales to Mercury, there was no comparable level of trade in the home market. Therefore, we were not able to make a level of trade adjustment.

Regarding its CEP sales in the United States, Yamaha identified three channels of distribution, claiming that the three constitute a single level of trade: (1) Sales by YMUS to OEM boat builders; (2) sales by YMUS to dealers and; (3) sales by G3 to dealers. For CEP sales, we examined the market processes and selling activities after deducting the U.S. selling expenses and associated profit. As a result, there are very few selling activities associated with Yamaha's CEP sales. Therefore, we preliminarily find that the CEP level of trade is not comparable to either level of trade in the home market.

Being unable to quantify a level of trade adjustment for CEP sales, we matched, where possible, to weighted-average home market sales at the closest home market level of trade (HM2) and granted a CEP offset pursuant to section 773(a)(7)(B) of the Act. Where we were unable to find a match at the closest level of trade, we matched to HM3 and granted a CEP offset.

Currency Conversions

We made currency conversions into U.S. dollars in accordance with section 773A of the Act based on exchange rates in effect on the dates of the U.S. sale, as obtained from the Federal Reserve Bank (the Department's preferred source for exchange rates).

Verification

In accordance with section 782(i) of the Act, we intend to verify all information relied upon in making our final determination for Yamaha.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing CBP to suspend liquidation of all entries of outboard engines from Japan that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We are also instructing CBP to require a cash deposit or the posting of a bond equal to the weighted-average dumping margin as indicated in the chart below. These instructions suspending liquidation will remain in effect until further notice.

The weighted-average dumping margins are provided below:

Producer/exporter	Weighted-average margin (percentage)
Yamaha	22.52
All Others	22.52

Disclosure

The Department will disclose calculations performed in accordance with 19 CFR 351.224(b).

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the final determination in this proceeding is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of outboard engines from Japan are materially injuring, or threaten material injury to, the U.S. industry.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs on the later of 50 days after the date of publication of this notice or one week after the issuance of the verification reports. *See* 19 CFR 351.309(c)(1)(i). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days after the deadline for the submission of case briefs. *See* 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, we will tentatively hold the hearing two days after the deadline for submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs. *See* 19 CFR 351.310(c). The Department will make its final determination no later than 135 days after the date of publication of this preliminary determination.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: August 5, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–18453 Filed 8–11–04; 8:45 am]

BILLING CODE 3510–DS–U

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–824]

Certain Polyethylene Terephthalate Film, Sheet and Strip From India: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results and rescission in part of Antidumping Duty Administrative Review.

SUMMARY: In response to requests from U.S. and Indian interested parties, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet and strip (PET film) from India. The review covers one manufacturer/exporter of subject merchandise and the period December 21, 2001, through June 30, 2003. Based upon our analysis, the Department has preliminarily determined that a dumping margin exists for the manufacturer/exporter covered by this administrative review. If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties as appropriate. Interested parties are invited to comment on these preliminary results of review.

EFFECTIVE DATE: August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen or Drew Jackson, AD/CVD Enforcement, Office IV, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2769 or (202) 482–4406, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 2, 2003, the Department published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on PET film from India. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, (68 FR 39511) (July 2, 2003); *see also Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 44175 (July 1, 2002) (*Amended Final Determination and Order*). On July 31, 2003, Garware Polyester Ltd., and Global PET films, Inc. (collectively, Garware), requested an administrative review of Garware. Garware withdrew its request for review on August 21, 2003. Additionally, on July 31, 2003, Dupont Teijin Films, Mitsubishi Polyester Film Of America, Toray Plastics (America), Inc., and SKC America, Inc., (collectively, the petitioners), requested an administrative review of Polyplex Corporation Ltd. (Polyplex). Finally, on July 31, 2003, Jindal Polyester Ltd. (Jindal) and Valencia Specialty Films (Valencia), a U.S. importer, requested an administrative review of Jindal.

The Department initiated an administrative review of Jindal and Garware on August 19, 2003, and September 24, 2003, respectively. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 FR 50750 (August 22, 2003), and *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review*, 68 FR 56262 (September 30, 2003) (Garware was inadvertently not named in the August 19, 2003, initiation notice). The Department did not initiate an administrative review of Polyplex because this company was excluded from the antidumping duty order on PET film from India. *See* Letter from Thomas F. Futtner, Acting Office Director, to Lynn M. Fischer, counsel for the petitioners, concerning, Request for Administrative Review of Polyplex, dated August 6, 2003.

On August 1, 2003, the Department issued its antidumping questionnaire to Jindal and Garware. Subsequently, the Department issued supplemental questionnaires to Jindal and Valencia. With the exception of Garware, which did not respond to the Department's questionnaire because it withdrew its request for review on August 21, 2003, the other parties responded to the Department's questionnaires in a timely manner.

On March 22, 2004, the Department extended the time limit for the preliminary results of this review until July 30, 2004. *See Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 17644 (April 5, 2004).

The Department is conducting this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended, (the Act).

Scope of the Review

For purposes of this order, the products covered are all gauges of raw, pretreated, or primed PET film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this order is dispositive.

Verification

As provided in section 782(i) of the Act, the Department verified the sales and cost information provided by Jindal, as well as information provided by Valencia, using standard verification procedures. Those procedures include an examination of relevant sales and financial records, and the selection of relevant source documentation as exhibits. Our verification findings are detailed in the following memoranda to the file from Jeffrey Pedersen and Drew Jackson: "Export Price and Home Market Sales Verification Report for Jindal Polyester Limited (EP Verification Report); Constructed Export Price Sales Verification Report for Jindal Polyester Limited (CEP Verification Report); and Cost Verification Report for Jindal Polyester Limited (Cost Verification Report). The public versions of these memoranda are on file in the Central Records Unit (CRU), room B–099 of the Department's main building.

Period of Review

The period of review (POR) is December 21, 2001, through June 30, 2003.

Partial Rescission of Review

19 CFR 351.213(d)(1) provides that the Department will rescind an administrative review, in whole or in part, if a party that requested a review withdraws its request within 90 days of the date of publication of the notice of initiation of the requested administrative review. Garware withdrew its request to be reviewed by the Department before the 90-day time period expired and no other parties requested an administrative review of Garware. Consequently, the Department is rescinding this administrative review with respect to Garware.

Affiliation

During the POR, Jindal's affiliated U.S. reseller, Jindal America Inc. (Jindal America), ceased operations. Jindal employed Jindal America's president, Mr. Hotmer, to sell Jindal America's remaining inventory of PET film. At the same time, Jindal began selling PET film to Valencia, a company wholly owned by Mr. Hotmer.

Section 771(33)(D) of the Act identifies an employer and its employee as affiliated persons. Jindal employed Mr. Hotmer during a portion of the POR. Although the word "employee" denotes a single person, the Court of International Trade has recognized that "words importing the singular may {not} extend and be applied to several persons or things * * * *except where it is necessary to carry out the evident intent of the statute* (emphasis added)." *See Ferro Union* v. *United States*, 44 F. Supp. 2d 1310, 1325 (CIT, March 23, 1999) citing *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 657 44 S. Ct. 213, 68 L. Ed. 486 (1924). Mr. Hotmer is the sole owner of, and performed the principal selling functions for Valencia, a small company that employed no more than three people during the POR. Thus, when Jindal engaged in business dealings with Valencia while it employed Mr. Hotmer, it was essentially dealing with its employee. The intent of the statute was to recognize such relationships. By treating Mr. Hotmer and Valencia as one for purposes of our affiliation analysis, we give effect to this intent. Therefore, the Department has preliminarily determined that Mr. Hotmer and Valencia were affiliated with Jindal during the portion of the POR that Jindal employed Mr. Hotmer. For a complete discussion of this issue, see the memorandum from Holly A. Kuga, Senior Director, Office IV, to Jeffrey A. May, Deputy Assistant Secretary, Group I, concerning, Affiliation and Use of Adverse Facts Available which is dated concurrently with this notice (Affiliation/AFA memorandum).

Use of Partial Facts Available

Valencia's Sales

The Department's antidumping questionnaire requires respondents to identify parties with whom they are affiliated, or potentially affiliated (see the definition of affiliated persons in Appendix I of the antidumping questionnaire which restates the criteria listed in section 773(33) of the Act). Specifically, section A of the Department's antidumping questionnaire requests respondents to describe all of their relationships with affiliated persons and any relationship with a person where the respondent is unsure whether the relationship may result in the person being considered an affiliate. Additionally, the antidumping questionnaire requests information regarding sales of subject merchandise made by parties in the United States that are affiliated with the respondent (*i.e.*, constructed export price (CEP) sales, see the definition of CEP sales in Appendix I of the antidumping questionnaire). Despite the definitions and instructions contained in the Department's questionnaire, in its questionnaire response, Jindal did not identify Valencia as an affiliate or a potential affiliate, nor did it report Valencia's sales of Jindal's PET film during the time that Jindal employed Mr. Hotmer. After examining Jindal's questionnaire responses and comments filed by the petitioners, the Department determined that additional information was needed regarding Jindal America, Mr. Hotmer, and one of Jindal's customers, Valencia. Subsequently, on November 7, 2003, December 19, 2003, and April 7, 2004, the Department issued supplemental questionnaires to Jindal requesting information regarding Jindal's relationship with Jindal America, Mr. Hotmer, and Valencia. Jindal's responses to these supplemental questionnaires contained conflicting and inaccurate information that was not clarified until verification. Thus, the Department did not have the information needed to make its determination regarding Jindal's affiliation with Valencia until late in this administrative review, and the record lacks sales information regarding Valencia's sales of Jindal's PET film during the period that Jindal employed Mr. Hotmer.

Section 776(a)(1) of the Act provides that if the necessary information is not on the record the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act requires the Department to inform a party that submits a deficient response of the nature of the deficiency and to give the party an opportunity to correct the deficiency; however, the Act does permit the Department to eventually cease issuing supplemental questionnaires if a respondent's responses continue to be inadequate and deficient. Jindal's questionnaire responses continue to be deficient because the record lacks Valencia's sales information. Therefore, pursuant to section 776(a) of the act, we are resorting to the use of partial facts available in determining Jindal's dumping margin.

In selecting from among the facts otherwise available, section 776(b) of the Act provides that if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of the party. The Act provides that an adverse inference may include reliance on information derived from the petition, a final determination in an antidumping investigation or review, or any other information placed on the record. *See* sections 776(b)(1), (2), (3), and (4) of the Act.

Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H. Rep. No. 103–316 at 870 (1994); *Borden, Inc.* v. *United States*, 4 F. Supp. 2d 1221 (CIT 1998); *Mannesmannrohren-Werke AG* v. *United States*, 77 F. Supp. 2d 1302 (CIT 1999). The Court of Appeals for the Federal Circuit (CAFC), in *Nippon Steel Corporation* v. *United States*, 337 F. 3d 1373, 1380 (Fed. Cir. 2003), provided an explanation of the "failure to act to the best of its ability" standard, holding that the Department need not show intentional conduct existed on the part of the respondent, but merely that a "failure to cooperate to the best of a respondent's ability" existed, *i.e.*, information was not provided "under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." *Id.*

During the course of the instant administrative review, Jindal initially failed to identify its relationship with Valencia, even though the Department's questionnaire requested such information, reported conflicting information regarding the relationship, and reported information regarding the relationship that was not clarified until verification. Thus, Jindal did not cooperate by acting to the best of its ability to comply with the Department's requests for information regarding its relationship with Valencia. Therefore, the Department has preliminarily determined that in selecting from among the facts available, an adverse inference is warranted. As partial adverse facts available, we assigned the highest dumping margin calculated in any segment of this proceeding to Jindal's sales to Valencia during the portion of the POR that Jindal employed Mr. Hotmer. For a complete discussion of

our use of adverse facts available, see the Affiliation/AFA memorandum.

Section 776(c) of the Act requires that the Department, to the extent practicable, corroborate secondary information from independent sources that are reasonably at its disposal. Secondary information is defined as "{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." *See* SAA at 870. The SAA clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. As noted in *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information.

The AFA rate used in these preliminary results constitutes secondary information. However, unlike other types of secondary information, such as input costs or selling expenses, there are no independent sources of information from which the Department can derive calculated dumping margins; the only source for dumping margins is administrative determinations. The preliminary AFA rate was calculated in the investigative phase of this proceeding using verified information. Moreover, this rate reflects recent commercial activity of an Indian company that sold PET film to the United States. Therefore, we consider this rate to be both reliable and relevant.

U.S. Inland Freight Expense

At verification, Jindal America was unable to substantiate the per-unit inland freight expense reported for its U.S. sales of subject merchandise. *See* CEP Verification Report at 19. Section 776(a)(D) of the Act provides that the Department shall use the facts otherwise available in reaching the applicable determination if the information provided cannot be verified. Thus, for all CEP sales, we have based the per-unit U.S. inland freight expense on facts available. Although Jindal America attempted to support the reported U.S. inland freight expenses with available documentation, it was unable to definitively link invoices for U.S. inland freight to specific U.S. sales. However, there is no indication that Jindal or Jindal America failed to act to the best of their abilities in attempting to supply the documentation required to verify the per-unit U.S. inland freight expenses for the sales at issue. Therefore, for these preliminary results, we have not made an inference that is adverse to Jindal's interests in selecting from among the facts otherwise available. As partial, non-adverse facts available, the Department replaced the per-unit U.S. inland freight expense reported for CEP sales with a weighted-average, per-unit U.S. inland freight expense. The Department calculated this weighted-average freight expense by dividing Jindal America's total freight expense by the total quantity of PET film sold by Jindal during the POR and delivered to customers. For additional information on this partial facts available adjustment, see the Department's Calculation Memorandum, issued concurrently with this notice.

Normal Value Comparisons

To determine whether the respondent's sales of PET film to the United States were made at less than normal value (NV), we compared the export price (EP) and CEP, as appropriate, to the NV, as described in the "Export Price," "Constructed Export Price" and "Normal Value" sections of this notice, below. We first attempted to compare contemporaneous U.S. and comparison-market sales of products that are identical with respect to the following characteristics, listed in order of importance for matching purposes: grade, thickness, and surface quality.[1] Where we were unable to compare sales of identical merchandise, we compared U.S. sales to comparison-market sales of the most similar merchandise based on the above characteristics. Where there were no appropriate sales of foreign like product to compare to a U.S. sale, we compared the price of the U.S. sale to constructed value (CV).

Export Price

Except for sales through Jindal America, the Department based U.S. price on EP, as defined in section 772(a) of the Act, because the merchandise was sold, prior to importation, to unaffiliated purchasers in the United States, or to an unaffiliated purchaser for exportation to the United States, and CEP methodology was not otherwise warranted based on the facts on the record. We calculated EP based on the packed, delivered prices charged to unaffiliated customers in the United States or to unaffiliated customers for exportation to the United States. In accordance with section 772(c)(2)(A) of the Act, we made deductions from the starting price, where applicable, for foreign movement expenses (including brokerage and handling and inland freight), international freight, and marine insurance. Where appropriate (*see* the "Duty Drawback" section below), we added to the starting price duty drawback received on imported materials, pursuant to section 772(c)(1)(B) of the Act. In accordance with section 772(c)(1)(C) of the Act, where appropriate, we increased U.S. price by the countervailing duty (CVD) rate attributable to the export subsidies found in the CVD investigation of PET film from India (the ongoing first administrative review of the CVD order has not yet been completed).

Constructed Export Price

For Jindal's sales through Jindal America, we based U.S. price on CEP, as defined in section 772(b) of the Act, because the merchandise was sold, after importation, by Jindal's U.S. affiliate, Jindal America, to unaffiliated purchasers in the United States.[2] We calculated CEP based on delivered prices to unaffiliated customers in the United States. We made deductions from the starting price, where appropriate, for foreign and U.S. brokerage and handling, foreign and U.S. inland freight, international freight, marine insurance, U.S. duties, and direct and indirect selling expenses to the extent that they are associated with economic activity in the United States in accordance with sections 772(c)(2)(A) and 772(d)(1)(B) and (D) of the Act. The direct selling expenses include credit expenses. In accordance with section 772(d)(3) of the Act, we made a deduction for CEP profit.

For both EP and CEP, pursuant to section 772(c)(1)(C) of the Act, we increased U.S. price by the amount of the export subsidy found in the countervailing duty investigation of PET film from India. *See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India*, 67 FR 34905 (May 16, 2002). We note that the Department is currently conducting a

[1] These matching criteria, which differ from those used in the investigative phase of the proceeding, are based on comments from the petitioners and the respondent as well as findings at verification. For additional information on these matching criteria, see the Department's Calculation Memorandum issued concurrently with this notice.

[2] Although certain sales through Valencia should have been based on CEP, Jindal failed to report these sales and thus, as noted above, the Department is basing the margin for these sales on adverse facts available.

countervailing duty review of PET film from India, which will be completed before the Department issues the final results of this antidumping duty review. Hence, for the final results of this antidumping duty administrative review, we intend to adjust U.S. price to reflect any export subsidy found in the concurrent countervailing duty review of PET film from India.

Duty Drawback

Jindal reported that it received duty drawback under both the Advance License program and the Duty Entitlement Passbook Scheme (DEPS). The Advance License program allows Indian companies to import specified materials duty-free if such materials are used to produce a product that is exported by the company. According to information on the record, each advance license limits the quantity of each material that may be imported duty-free. No customs duties are paid on the imported materials; however, there is a contingent liability for the unpaid duties. This contingent liability is extinguished by exporting finished products containing the types of materials covered by the advance license. Under the DEPS program, Indian companies are granted a credit which is equivalent to 14 percent of the free-on-board (FOB) value of their exports. These companies then use this credit to offset the customs duty paid on imported materials used to manufacture exported products.

Before increasing a respondent's reported U.S. sales prices by the amount of duty drawback, pursuant to section 772(c)(1)(B) of the Act, the Department's practice is to examine whether: (1) Import duties and rebates are directly linked to and are dependent upon one another, and (2) the company claiming the adjustment can demonstrate that there are sufficient imports of raw materials to account for the duty drawback received on exports of the manufactured product. *See Steel Wire Rope from the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 FR 55965, 55968 (October 30, 1996).

With regard to Jindal's experience under the Advance License program, the Department has preliminarily determined that import duties and rebates are directly linked and dependent upon one another and Jindal imported sufficient quantities of raw materials to account for the duty drawback granted. Accordingly, the Department has added an amount for duty drawback to EP and CEP.

With regard to the DEPS program, the Department has preliminarily determined that Jindal failed to demonstrate that import duties and rebates are directly linked and dependent upon one another. The DEPS program does not require a company to link the DEPS credit granted on the exported merchandise to the import duties paid on the types of raw materials used to manufacture the exported product. In fact, at verification, the Department found that Jindal may apply the DEPS credit toward the payment of import duties on any type of material (other than illegal or dangerous materials listed by the GOI) or simply sell the DEPS credit. *See* the "DEPS" section of the EP Sales Verification Report. While the Department does not require a respondent to link a specific entry of materials on which duties were paid (or which was imported duty-free) to a specific export of finished product on which the rebate is based, it does require the respondent to demonstrate that the imported materials are of the same type used to produce the exported product. Further, the Department will only grant a duty drawback adjustment if the rebated import duty is on materials used to produce subject merchandise. Jindal made no attempt to link the quantity of materials imported under the DEPS program with the quantity of materials consumed in producing exported PET film. *See* the "DEPS" section of the EP Sales Verification Report. Based on the foregoing, the Department has not increased Jindal's reported U.S. sales prices by the amount of duty drawback granted under the DEPS program.

Level of Trade (LOT)

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same LOT as the EP or CEP sales. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general, and administrative (SG&A) expenses and profit. For EP sales, the U.S. LOT is also the level of the starting-price sale. For CEP sales, it is the level of the constructed sale from the exporter to the importer. The Department adjusts the CEP, pursuant to section 772(d) of the Act, prior to performing the LOT analysis, as articulated by the Department's regulations at section 351.412. *See Micron Technology, Inc.* v. *United States*, 243 F.3rd 1301, 1315 (Fed. Cir. 2001).

To determine whether NV sales are at a different LOT than the EP or CEP sales, we examine stages in the marketing process and selling activities along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV as provided under section 773(a)(7)(B) of the Act (the CEP offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61731 (November 19, 1997).

In determining whether separate LOTs exist, we obtained information regarding the marketing stages for the reported home market and U.S. sales, including a description of the selling activities performed by Jindal and Jindal America for each channel of distribution. We generally expect that, if claimed LOTs are the same, the selling functions and activities of the seller at each level should be similar. Conversely, if a party claims that LOTs are different for different groups of sales, the selling functions and activities of the seller for each group should be dissimilar. Based on our comparisons of Jindal's direct sales to unaffiliated customers and its sales through Jindal America, we have determined that the U.S. sales are at two different LOTs.

Jindal reported home market sales to two categories of customers through two channels of distribution. However, the record indicates that the sales processes for all home market sales are essentially the same. Therefore, we have preliminarily determined that, during the POR, Jindal sold foreign like product in the home market at one LOT.

The Department then compared the LOT of Jindal's home market sales to the LOT of its direct sales to unaffiliated U.S. customers. Based on this comparison, the Department has determined that Jindal's home market sales were made at the same LOT as its direct sales to unaffiliated U.S. customers. Therefore, the Department has preliminarily determined that no LOT adjustment for Jindal's sales to unaffiliated U.S. customers is warranted.

Additionally, we have preliminarily determined that Jindal's sales to its unaffiliated customers in the home

market were not made at an LOT that is more advanced than its sales to its U.S. affiliate, and therefore, a CEP offset adjustment is not warranted.[3] *See* Memorandum to the file from the Team to the File, concerning, Level of Trade Analysis: Jindal Polyester Limited which is dated concurrently with this notice.

Normal Value

After testing home market viability, whether home market sales to affiliates were at arm's-length prices, and whether comparison-market sales failed the cost test, we calculated NV as noted in the subsections, "Price-to-Price Comparisons" and "Price-to-CV Comparisons," below.

Home Market Viability

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, whether the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared the respondent's volume of home market sales of the foreign like product to the volume of its U.S. sales of subject merchandise, in accordance with section 773(a)(1) of the Act. Because the respondent's aggregate volume of home market sales of the foreign like product is greater than five percent of its aggregate volume of U.S. sales of subject merchandise, we determined that the home market is viable for the respondent, and have used the home market as the comparison-market.

Affiliated-Party Transactions and Arm's-Length Test

The Department may calculate NV based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the prices at which sales are made to parties not affiliated with the producer, *i.e.*, sales at arm's-length. *See* section 773(f)(2) of the Act; 19 CFR 351.403(c). Where the home market prices charged to an affiliated customer were, on average, found not to be arm's-length prices, sales to the affiliated customer were excluded from our analysis. Jindal reported one sale of the foreign like product to an affiliated end-user. To test whether this sale was made at an arm's-length price, the Department compared the price of this sale to sales of comparable merchandise to unaffiliated customers, net of all rebates, movement charges, direct selling expenses, and packing. Pursuant to 19 CFR 351.403(c), and in accordance with the Department's practice, when the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise comparable to that sold to the affiliated party, we determined that the sales to the affiliated party were at arm's-length prices. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002). We included in our NV calculations all sales to an affiliated party if sales to the affiliate were made at an arm's-length price.

Cost of Production Analysis

On October 15, 2003, the petitioners alleged that, during the POR, Jindal made home market sales of PET film at prices below the cost of production (COP). After finding that the petitioners' allegation provided reasonable grounds to initiate a COP investigation, the Department, pursuant to section 773(b) of the Act, initiated a COP investigation of Jindal. We conducted the COP analysis as described below.

A. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP, by model, for the POR, based on the sum of materials and fabrication costs, SG&A expenses, and packing costs.

B. Test of Home Market Sales Prices

As required under section 773(b) of the Act, we compared the weighted-average COPs to the home market sales prices of the foreign like product, in order to determine whether these sales had been made at prices below the COP within an extended period of time in substantial quantities, and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. On a product-specific basis, we compared the COP to home market sales prices, less any applicable movement charges and direct and indirect selling expenses.

C. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of Jindal's sales of a given product were made at prices below the COP, we did not disregard any below-cost sales of that product because the below-cost sales were not made in "substantial quantities." Where 20 percent or more of Jindal's sales of a given product were made at prices below the COP, we determined that such sales were made in substantial quantities within an extended period of time (*i.e.*, a period of one year). Further, because we compared prices to POR-average costs, we determined that the below-cost prices would not permit recovery of all costs within a reasonable time period, and thus, we disregarded the below-cost sales in accordance with sections 773(b)(1) and (2) of the Act.

We found that for certain products, Jindal made home market sales at prices below the COP within an extended period of time in substantial quantities. Further, we found that these sales prices did not permit the recovery of costs within a reasonable period of time. Therefore, we excluded these sales from our analysis in accordance with section 773(b)(1) of the Act.

Price-to-Price Comparisons. Where it was appropriate to base NV on prices, we used the prices at which the foreign like product was first sold for consumption in India, in the usual commercial quantities, in the ordinary course of trade, and, to the extent possible, at the same LOT as the comparison EP or CEP sale.

We determined price-based NVs for Jindal as follows: we calculated NV based on packed, delivered and ex-factory prices to home market customers. Where appropriate, we increased the starting price for interest revenue. We made deductions from the starting price for foreign inland freight, where appropriate, pursuant to sections 773(a)(6)(B)(ii) of the Act. Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(c), we made circumstance-of-sale adjustments to the starting price, where appropriate, for differences in credit and bank expenses.

We deducted home market packing costs from, and added U.S. packing costs to, the starting price, in accordance with sections 773(a)(6)(A) and (B) of the Act. Where appropriate, we made adjustments to NV to account for differences in the physical characteristics of the merchandise sold in the U.S. and home market, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. In accordance with the Department's practice, where all contemporaneous matches to a U.S. sale resulted in difference-in-merchandise adjustments exceeding 20 percent of the cost of manufacturing (COM) the U.S. product, we based NV on CV.

Price-to-CV Comparisons. In accordance with section 773(a)(4) of the Act, we based NV on CV when we were unable to compare the U.S. sale to a home market sale of an identical or similar product. For each unique PET film product sold by the respondent in

[3] Jindal stated in its response to section A of the Department's questionnaire that it was not requesting a CEP offset.

the United States during the POR, we calculated a weighted-average CV based on the sum of the respondent's materials and fabrication costs, SG&A expenses, including interest expenses, packing costs, and profit. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product, in the ordinary course of trade, for consumption in India. We based selling expenses on weighted-average actual home market direct and indirect selling expenses. In calculating CV, we adjusted the reported costs as described in the COP section above.

Currency Conversion. Pursuant to section 773A(a) of the Act, we converted amounts expressed in foreign currencies into U.S. dollar amounts based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

As a result of this review, we preliminarily determine that the following weighted-average dumping margin exists for the period December 21, 2001, through June 30, 2003:

Manufacturer/exporter	Margin (percent)
Jindal Polyester Ltd.	9.59

We will disclose the calculations used in our analysis to parties to this proceeding within 10 days of publicly announcing the preliminary results of review. *See* 19 CFR 351.224(b). Any interested party may request a hearing within 30 days of the publication date of this notice. *See* 19 CFR 351.310(c). If requested, a hearing will be held 44 days after the date of publication of this notice, or the first workday thereafter. Interested parties are invited to comment on the preliminary results. The Department will consider case briefs filed by interested parties within 30 days of the date of publication of this notice. Also, interested parties may file rebuttal briefs, limited to issues raised in the case briefs. The Department will consider rebuttal briefs filed not later than five days after the deadline for filing case briefs. Parties who submit arguments are requested to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument and (3) a table of authorities. Further, we ask that parties submitting written comments provide the Department with a copy of the public version of any such comments on a diskette. Unless extended, the Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any written comments, within 120 days from the publication date of this notice.

Assessment Rate

Upon completion of this administrative review, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), when possible, we calculated an importer-specific assessment rate for merchandise subject to this review. Where the importer-specific assessment rate is above *de minimis*, we will instruct CBP to assess the importer-specific rate uniformly on the entered customs value of all entries of subject merchandise made by the importer during the POR. When it was not possible to calculate an importer-specific assessment rate because the importer was not known, we calculated an exporter-specific *ad valorem* assessment rate. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of the instant administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed company will be the rate established in the final results (except that if the rate is *de minimis, i.e.*, less than 0.5 percent, no cash deposit will be required); (2) for previously investigated or reviewed companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less than fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be the "all others" rate of 5.71 percent, which is the "all others" rate established in the LTFV investigation, adjusted for the export subsidy rate in the countervailing duty investigation. *See Amended Final Determination and Order.* These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and this notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 30, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–18404 Filed 8–11–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 080904A]

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a public meeting of the Aquaculture Advisory Panel (AP) to redraft the Generic Amendment Providing for Regulation of Offshore Marine Aquaculture in August 2004.

DATES: The Council's Aquaculture Advisory Panel will convene from 1 p.m. on August 25, 2004 and conclude no later than 3 p.m. on August 26, 2004 (see **ADDRESSES** for the meeting location).

ADDRESSES: The meeting will be held at the Saint Louis Hotel, 730 Rue Bienville, New Orleans, LA; telephone: 888–508–3980 (see **DATES** for the meeting date and time).

Copies of the discussion material for this meeting may be obtained by calling 813–228–2815.

Council address: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619.

FOR FURTHER INFORMATION CONTACT: Wayne Swingle, Executive Director, Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619; telephone: 813–228–2815.

SUPPLEMENTARY INFORMATION: The AP consists largely of scientists with expertise in marine aquaculture. The AP will be redrafting the Generic Amendment Providing for Regulation of Offshore Marine Aquaculture (Amendment). The draft amendment contains scientific information on the culture of marine fish and on the environmental effects of such aquaculture. The amendment also contains many alternatives that could be used to regulate aquaculture by best management practices (BMP). The Council solicited public comment on the draft amendment in eight scoping hearings. The AP will consider these public recommendations in redrafting the amendment.

The Gulf of Mexico Fishery Management Council is one of eight regional fishery management councils that were established by the Magnuson-Stevens Fishery Conservation and Management Act of 1976. The Gulf of Mexico Fishery Management Council prepares fishery management plans that are designed to manage fishery resources in the U.S. Gulf of Mexico.

See **ADDRESSES** for copies of the discussion material for this meeting. Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is open to the public and is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Dawn Aring at the Council (see **ADDRESSES**) by August 13, 2004.

Dated: August 9, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–1783 Filed 8–11–04; 8:45 am]

BILLING CODE

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 080904C]

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a public meeting of the Finfish Stock Assessment Panel (FSAP) to review proposed revisions to the regulations serving as guidelines for interpreting National Standard One under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) in August 2004.

DATES: The Council's FSAP will convene from 1 p.m. to 4:30 p.m. on August 30, 2004.

ADDRESSES: The meeting will be held at the DoubleTree Guest Suites Tampa Bay, 3050 North Rocky Point Drive West, Tampa, FL; telephone: 813–888–8800.

Copies of the discussion material for this meeting may be obtained by calling 813–228–2815.

Council address: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619.

FOR FURTHER INFORMATION CONTACT: Wayne Swingle, Executive Director, Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619; telephone: 813–228–2815.

SUPPLEMENTARY INFORMATION: National Standard One of the Magnuson-Stevens Act provides management will prevent overfishing while achieving optimum yield from fishery stocks. The guidelines for this standard provide technical guidance on assessing the status of stocks, preventing overfishing and rebuilding overfished stocks. NOAA Fisheries, after scientific review, is preparing to amend the guidelines. The Council's FSAP consists of scientists with expertise on management of fishery stocks and mathematically assessing the status of such stocks. The FSAP will review the revisions proposed by NOAA Fisheries and make their recommendations to the Council on the scientific merit of the proposed changes and/or the need for additional changes.

The Gulf of Mexico Fishery Management Council is one of eight regional fishery management councils that were established by the Magnuson-Stevens Act of 1976. The Gulf of Mexico Fishery Management Council prepares fishery management plans that are designed to manage fishery resources in the U.S. Gulf of Mexico.

See **ADDRESSES** to obtain copies of the discussion material for this meeting. Although non-emergency issues not contained in the agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is open to the public and is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Dawn Aring at the Council (see **ADDRESSES**) by August 13, 2004.

Dated: August 9, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–1811 Filed 8–11–04; 8:45 am]

BILLING CODE

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Revision of Limitations of Duty- and Quota-Free Imports of Apparel Articles Assembled in Beneficiary Sub-Saharan African Countries from Regional and Third-Country Fabric for the 12-Month Period October 1, 2003 through September 30, 2004

August 9, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Publishing Revisions to the Fourth 12-Month Cap on Duty- and Quota-Free Benefits.

EFFECTIVE DATE: August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Anna Flaaten, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Title I, Section 112(b)(3) of the Trade and Development Act of 2000, as amended by Section 3108 of the Trade Act of 2002 and Section 7(b)(2) of the AGOA Acceleration Act of 2004; Presidential Proclamation 7350 of October 4, 2000 (65 FR 59321); Presidential Proclamation 7626 of November 13, 2002 (67 FR 69459).

Title I of the Trade and Development Act of 2000 (TDA 2000) provides for duty- and quota-free treatment for certain textile and apparel articles imported from designated beneficiary sub-Saharan African countries. Section 112(b)(3) of TDA 2000 provides duty- and quota-free treatment for apparel articles wholly assembled in one or more beneficiary sub-Saharan African countries from fabric wholly formed in one or more beneficiary countries from yarn originating in the U.S. or one or more beneficiary countries. This preferential treatment is also available for apparel articles assembled in one or more lesser-developed beneficiary sub-Saharan African countries, regardless of the country of origin of the fabric used to make such articles. TDA 2000 imposed a quantitative limitation on imports eligible for preferential treatment under these two provisions.

The Trade Act of 2002 amended TDA 2000 to extend preferential treatment to apparel assembled in a beneficiary sub-Saharan African country from components knit-to-shape in a beneficiary country from U.S. or beneficiary country yarns and to apparel formed on seamless knitting machines in a beneficiary country from U.S. or beneficiary country yarns, subject to the quantitative limitation. The Trade Act of 2002 also increased the quantitative limitation but provided that this increase would not apply to apparel imported under the special rule for lesser-developed countries. The Trade Act of 2002 provided that the quantitative limitation for the year beginning October 1, 2003 would be an amount not to exceed 4.7931 percent of the aggregate square meter equivalents of all apparel articles imported into the United States in the preceding 12-month period for which data are available. Of this overall amount, apparel imported under the special rule for lesser-developed countries is limited to an amount not to exceed 2.3571 percent of apparel imported into the United States in the preceding 12-month period. For the purpose of the calculation of the 12-month period that began on October 1, 2003 , the most recent 12-month period for which data were available was the 12-month period ending July 31, 2003.

Section 7(b)(2)(B)(ii)(I) of the AGOA Acceleration Act of 2004 extended the expiration of the quantitative limitations. It also amended the percentage to be used in calculating the cap for the twelve-month period that began on October 1, 2003 and extends through September 30, 2004. The new percentage is 4.747. The sub-cap applicable for apparel articles under the special rule for lesser-developed countries remains unchanged for this twelve-month period.

Presidential Proclamation 7350 directed CITA to publish the aggregate quantity of imports allowed during each 12-month period in the Federal Register. Presidential Proclamation 7626, published on November 18, 2002, modified the aggregate quantity of imports allowed during each 12-month period. On September 16, 2003, CITA published the cap for the 12-month period from October 1, 2003 to September 30, 2004.

For the twelve-month period that began on October 1, 2003 and extends through September 30, 2004, the aggregate quantity of imports eligible for preferential treatment under these provisions is revised to 947,368,444 square meters equivalent. Of this amount, 470,411,241 square meters equivalent is available to apparel imported under the special rule for lesser-developed countries. These quantities will be recalculated for each subsequent year. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

These quantities are calculated using the aggregate square meter equivalents of all apparel articles imported into the United States, derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (ATC), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.04–18468 Filed 8–11–04; 8:45 am]

BILLING CODE 3510–DR–S

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 13, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: August 9, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Vocational and Adult Education

Type of Review: Extension.
Title: Adult Education and Family Literacy Act State Plan (PL 105–220).
Frequency: Annually.
Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.
Reporting and Recordkeeping Hour Burden:
Responses: 59.
Burden Hours: 2,655.
Abstract: It is unlikely that Congress will pass a reauthorization of the Workforce Investment Act (WIA) this year. Therefore, the enclosed Policy

Memorandum is designed to advise states about how to continue their adult education program under Section 422 of the General Education Provisions Act (GEPA) [20 U.S.C. 1226 (a)].

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2555. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at *Sheila.Carey@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 04–18444 Filed 8–11–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–994–000]

Boston Generating, LLC; Notice of Issuance of Order

August 6, 2004.

Boston Generating, LLC (Boston Generating) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of capacity, energy, and ancillary services at market-based rates. Boston Generating also requested waiver of various Commission regulations. In particular, Boston Generating requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Boston Generating.

On July 30, 2004, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—South, granted the request for blanket approval under part 34, subject to the following:

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Boston Generating should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Notice is hereby given that the deadline for filing motions to intervene or protest is August 30, 2004.

Absent a request to be heard in opposition by the deadline above, Boston Generating is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Boston Generating, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Boston Generating's issuances of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1789 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–438–000]

Chandeleur Pipe Line Company; Notice of Proposed Changes in FERC Gas Tariff

August 5, 2004.

Take notice that on August 3, 2004, Chandeleur Pipe Line Company tendered for filing as part of its FERC Gas Tariff, Volume No. 1 the following tariff sheets, to become effective September 1, 2004:

First Revised Sheet No. 6B
Third Revised Sheet No. 13
First Revised Sheet No. 25A

Chandeleur tendered this filing in order to modify certain tariff provisions to more accurately reflect Chandeleur's operating practices.

Chandeleur states that Sheet Nos. 6B and 13 replace the word "deliveries" with the word "transportation" to reflect Chandeleur's practice of billing transportation based on volumes received. Additionally, Chandeleur states that it has added a paragraph allowing for the use of discretion in enforcing gas quality specifications in order to ensure that all supplies within a reasonable range of quality remain eligible for transportation.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail

FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1809 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–439–000]

Notice of Tariff Filing; Clear Creek Storage Company, L.L.C.

August 5, 2004.

Take notice that on August 4, 2004, Clear Creek Storage Company, L.L.C., (Clear Creek) tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, the Title Page and First Revised Sheet No. 72, to be effective September 3, 2004.

Clear Creek states that the purpose of this tariff filing is to update the Title Page and the names of officers and shared employees on First Revised Sheet No. 72 of Clear Creek's tariff. These changes are required due to employee retirements.

Clear Creek states further that a copy of this filing has been served upon its customers and the Public Service Commission of Wyoming.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1796 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP91–161–032]

Columbia Gas Transmission Corporation; Notice of Refunds

August 6, 2004.

Take notice that on July 20, 2004, Columbia Gas Transmission Corporation (Columbia) filed to report on the flow-back to customers of funds received from insurance carriers for environmental costs attributable to Columbia's Docket No. RP91–161 settlement period.

Columbia states that it allocated such recoveries among customers based on their fixed cost responsibility for services on the Columbia system during the period December 1, 1991, through January 31, 1996, the period of the Docket No. RP91–161 settlement.

Columbia states further that it provided a copy of the report to all customers who received a share of the environmental insurance recoveries and all state commissions whose jurisdiction includes the location of any such recipient.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. eastern time on August 13, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1784 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–632–013]

Dominion Transmission, Inc.; Notice of Fuel Report

August 5, 2004.

Take notice that on June 30, 2004, Dominion Transmission, Inc. (DTI) tendered for filing its informational fuel report. DTI states that the fuel report details DTI's System Gas Requirements and gas retained or otherwise obtained for the twelve-month period ending March 31, 2004.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at

http://www.ferc.gov. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. eastern time on August 12, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1805 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–415–016 and RP04–398–000]

East Tennessee Natural Gas Company; Notice of Initiation of Proceeding

August 6, 2004.

On August 4, 2004, the Commission issued an order initiating a proceeding in Docket No. RP04–398–000 under section 5 of the Natural Gas Act, 15 U.S.C. 717d (2000). The Commission's order directed East Tennessee Natural Gas Company (East Tennessee) to submit a filing within 30 days of the issuance date of the order to either (a) show that all services over the Rocky Top, Gateway and Murray Projects cause East Tennessee to incur no gas losses; or (b) make an alternative proposal for assessing lost-and-unaccounted-for gas charges for these expansion projects. The Commission will issue a notice pertaining to East Tennessee's filing and persons having an interest in the proceeding will be allowed to intervene, in accordance with the Commission's regulations.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1794 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–361–037]

Gulfstream Natural Gas System, L.L.C.; Notice of Negotiated Rate

August 6, 2004.

Take notice that on July 27, 2004, Gulfstream Natural Gas System, L.L.C. (Gulfstream) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Original Sheet No. 8.01f, reflecting an effective date of August 1, 2004.

Gulfstream states that this filing is being made in connection with a negotiated rate transaction pursuant to section 31 of the General Terms and Conditions of Gulfstream's FERC Gas Tariff. Gulfstream states that Original Sheet No. 8.01f identifies and describes the negotiated rate transaction, including the exact legal name of the relevant shipper, the negotiated rate, the rate schedule, the contract terms, and the contract quantity. Gulfstream also states that Original Sheet No. 8.01f includes footnotes where necessary to provide further details on the transaction listed thereon.

Gulfstream states that copies of its filing have been mailed to all affected customers and interested state commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1793 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2726]

Idaho Power Company; Notice of Authorization for Continued Project Operation

August 5, 2004.

On July 29, 2002, Idaho Power Company, licensee for the Upper and Lower Malad Project No. 2726, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2726 is located on the Malad River in Gooding County, Idaho.

The license for Project No. 2726 was issued for a period ending July 31, 2004. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in Section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of Section 15 of the FPA, then, based on Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for

a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to Section 15 of the FPA, notice is hereby given that an annual license for Project No. 2726 is issued to Idaho Power Company for a period effective August 1, 2004 through July 31, 2005, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 1, 2005, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under Section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to Section 15 of the FPA, notice is hereby given that Idaho Power Company is authorized to continue operation of the Upper and Lower Malad Project No. 2726 until such time as the Commission acts on its application for subsequent license.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1802 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–437–000]

Iroquois Gas Transmission System, L.P.; Notice of Proposed Changeto FERC Gas Tariff

August 5, 2004.

Take notice that on August 2, 2004, Iroquois Gas Transmission System, L.P. (Iroquois) tendered for filing the following revised sheets to its FERC Gas Tariff, First Revised Volume No. 1, to be effective on September 1, 2004:

Sixth Revised Sheet No. 94
Fourth Revised Sheet No. 97
Seventh Revised Sheet No. 106
First Revised Sheet No. 161A
Sixth Revised Sheet No. 162

Iroquois states that the purpose of Iroquois' instant filing is to submit additional revisions to tariff sheets that were submitted to the Commission on May 7, 2004 and approved on June 2, 2004 removing language waiving the rate ceiling for short-term (less than one year) capacity release transactions between March 27, 2000 and September 1, 2002.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1808 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–2408–000]

Lower Mount Bethel Energy, LLC; Notice of Issuance of Order

August 6, 2004.

Lower Mount Bethel Energy, LLC (LMBE) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of capacity, energy, and ancillary services at market-based rates. LMBE also requested waiver of various Commission regulations. In particular, LMBE requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by LMBE.

On September 18, 2002, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—Central, granted the request for blanket approval under Part 34, subject to the following:

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by LMBE should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Notice is hereby given that the deadline for filing motions to intervene or protests is August 16, 2004.

Absent a request to be heard in opposition by the deadline above, LMBE is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of LMBE, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of LMBE's issuances of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the

"e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1787 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12514–000]

Northern Indiana Public Service Company; Notice of Application Tendered for Filing With the Commission, Soliciting Additional Study Requests, and Establishing Procedures for Relicensing and a Deadline for Submission of Final Amendments

August 5, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original major license.

b. *Project No.:* 12514–000.

c. *Date Filed:* June 28, 2004.

d. *Applicant:* Northern Indiana Public Service Company.

e. *Name of Project:* Norway and Oakdale Hydroelectric Project.

f. *Location:* On the Tippecanoe River in Carroll and White Counties, Indiana. The project does not affect Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Jerome B. Weeden, Vice President Generation; Northern Indiana Public Service Company; 801 East 86th Avenue; Merrillville, IN 46410; (219) 647–5730.

i. *FERC Contact:* Sergiu Serban at (202) 502–6211, or *sergiu.serban@ferc.gov.*

j. *Cooperating Agencies:* We are asking Federal, State, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing comments described in item l below.

k. Pursuant to Section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for Filing Additional Study Requests and Requests for Cooperating Agency Status:* 60 days from the date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The Commission's Rules of Practice require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Additional study requests may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filing. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link. After logging into the e-Filing system, select "Comment on Filing" from the Filing Type Selection screen and continue with the filing process."

m. *Status:* This application is not ready for environmental analysis at this time.

n. *Description of Project:* The existing Norway Oakdale Hydroelectric Project consists of the Norway development and the Oakdale development and has a combined installed capacity of 16.4 megawatts (MW). The project produces an average annual generation of 27,538 megawatt-hours (MWh). All power is dispatched directly into the local grid and is used within the East Central Area Reliability Coordination Agreement.

The Norway development includes the following constructed facilities: (1) a 915-foot-long dam consisting of a 410-foot-long, 34-foot-maximum-height earthfill embankment with a concrete corewall; a 225-foot-long, 29-foot-high concrete gravity overflow spillway with flashboards; a 120-foot-long, 30-foot-high concrete gated spillway with three 30-foot-wide, 22-foot-high spillway gates; a 18-foot-wide, 30-foot-high trash sluice housing with one 8-foot-wide, 11-foot-high gate; and a 142-foot-long, 64-foot-wide powerhouse integral with the dam containing four vertical Francis turbines-generating units with a rated head of 28 feet, total hydraulic capacity of 3,675 cubic feet per second (cfc) and a total electric output of 7.2 MW; (2) a 10-mile-long, 10-foot average depth, 1,291-acre reservoir; (3) a two-mile-long 69,000 volt transmission line; and (4) appurtenant facilities.

The Oakdale development includes the following constructed facilities: (1) a 1,688-foot-long dam consisting of a 126-foot-long, 58-foot-maximum-height east concrete buttress and slab dam connecting the left abutment to the powerhouse; a 114-foot-long, 70-foot-wide powerhouse integral with the dam containing three vertical Francis turbines-generating units with a rated head of 42 to 48 feet, total hydraulic capacity of 3,200 cubic feet per second (cfc) and a total electric output of 9.2 MW; an 18-foot-wide structure containing a nonfunctional fish ladder and a gated trash sluice; an 84-foot-long ogee-shaped concrete gated spillway with two 30-foot-wide, 22-foot-high vertical lift gates; a 90-foot-long, six bay concrete gravity siphon-type auxiliary spillway; and a 1,260-foot-long west earth embankment with a maximum height of 58 feet and a 30-foot-wide crest; (2) a 10-mile-long, 16-foot average depth, 1,547-acre reservoir; and (3) appurtenant facilities.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field (P–12514), to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http:// www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice, we are initiating consultation with the *Indiana State Historic Preservation Officer* (SHPO), as required by § 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

q. Procedural schedule and final amendments: The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made if the Commission determines it necessary to do so:

Milestone	Tentative date
Tendering Notice	August 2004.
Notice of Acceptance / Notice of Ready for Environmental Analysis	September 2004.
Filing of Recommendations, Preliminary Terms and Conditions, and Fishway Prescriptions	November 2004.
Commission issued Non-Draft EA	April 2005.
Comments on EA	June 2005.
Modified Terms and Conditions	August 2005.
Ready for Commission Decision on the Application	October 2005.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the Notice of Ready for Environmental Analysis.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1800 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2720]

City of Norway, MI; Notice of Authorization for Continued Project Operation

August 5, 2004.

On July 29, 2002, the City of Norway, Michigan, licensee for the Sturgeon Falls Project No. 2720, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2720 is located on the Menominee River in Dickinson County, Michigan and Marinette County, Wisconsin.

The license for Project No. 2720 was issued for a period ending July 31, 2004. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2720 is issued to the City of Norway, Michigan for a period effective August 1, 2004, through July 31, 2005, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 1, 2005, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the City of Norway, Michigan is authorized to continue operation of the Sturgeon Falls Project No. 2720 until such time as the Commission acts on its application for subsequent license.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1801 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–1325–000]

PPL Sundance Energy, LLC; Notice of Issuance of Order

August 6, 2004.

PPL Sundance Energy, PPL (PPL Sundance) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of capacity, energy, and ancillary services at market-based rates. PPL Sundance also requested waiver of various Commission regulations. In particular, PPL Sundance requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by PPL Sundance.

On May 2, 2002, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—West, granted the request for blanket approval under part 34, subject to the following:

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by PPL Sundance should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Notice is hereby given that the deadline for filing motions to intervene or protest, is August 16, 2004.

Absent a request to be heard in opposition by the deadline above, PPL Sundance is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of PPL Sundance, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of PPL Sundance's issuances of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions

on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1786 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–411–000]

Sabine Pipe Line LLC; Notice of Request for Waiver

August 5, 2004.

Take notice that on June 1, 2004, Sabine Pipe Line LLC (Sabine) filed a request for a waiver of section 284.12(c)(3) of the Commission's regulations to the extent it requires EDI/EDM capability. Sabine states that its customers have not used this application, and prefer instead the capability now offered through Sabine's high speed communications and interactive Web site.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. eastern time on August 12, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1806 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–14–002]

Saltville Gas Storage Company L.L.C.; Notice of Compliance Filing

August 5, 2004.

Take notice that on August 2, 2004, Saltville Gas Storage Company L.L.C. (Saltville) tendered for filing a compliance filing pursuant to the "Order Issuing Certificates" issued by the Commission on June 14, 2004, in the referenced docket.

Saltville states that copies of the filing were served on all parties on the official service list in the above captioned proceeding, as well as to all affected customers of Saltville and interested state commissions.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. eastern time on August 20, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1810 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–426–019]

Texas Gas Transmission, LLC; Notice of Negotiated Rate

August 5, 2004.

Take notice that on July 30, 2004, Texas Gas Transmission, LLC, (Texas Gas) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, Second Revised Sheet No. 51, to become effective August 1, 2004.

Texas Gas states that the purpose of this filing is to submit to the Commission a revised tariff sheet detailing a negotiated rate agreement between Texas Gas and Noble Energy Marketing, Inc. (Noble), dated July 23, 2004, to be effective August 1, 2004, under a Firm Transportation (FT) service agreement. Texas Gas further states that this negotiated rate agreement is being submitted in compliance with "Section 38. Negotiated Rates" of the General Terms and Conditions of Texas Gas" tariff and the Commission's modified policy on negotiated rates [104 FERC ¶61,134 (2003)].

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the

"eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1804 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–385–000]

Transcontinental Gas Pipeline Corporation; Crosstex CCNG Transmission, Ltd.; Notice of Application

August 5, 2004.

Take notice that on July 28, 2004, Transcontinental Gas Pipeline Corporation (Transco), P.O. Box 1396, Houston, Texas 77251, and Crosstex CCNG Transmission, Ltd. (Crosstex), 2501 Cedar Springs, Suite 600, Dallas, Texas 75201, filed, in Docket No. CP04–385–000, an application pursuant to section 7(b) of the Natural Gas Act (NGA) and Part 157 of the Commission regulations, for authorization to abandon, by sale to Crosstex, certain of Transco's natural gas pipeline facilities (South Texas Pipeline Facilities), located in South Texas, and for authorization to abandon Gulf South's related transportation services. Transco and Crosstex also request that the Commission find that the South Texas Pipeline Facilities, once abandoned and operated by Crosstex as an intrastate pipeline, will be exempt from the Commission's regulation, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "e-Library" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Transco's contact person for this proceeding is Scott C. Turkington, Director, Rates & Regulatory, (713) 215–3391, P.O. Box 1396, Houston, Texas 77251. Crosstex's contact person for this proceeding is Leslie J. Wylie, Vice President, Legal and Administration, (214) 721–9321, 2501 Cedar Springs Road, Suite 600, Dallas, Texas 75201.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10) by the comment date, below. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Protests, comments and interventions may be filed electronically via the Internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date: August 26, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1797 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–387–000]

Transcontinental Gas Pipe Line Corporation; Notice of Application for Abandonment

August 5, 2004.

Take notice that on July 29, 2004, Transcontinental Gas Pipe Line Corporation (Transco) filed with the Commission an application under section 7 of the Natural Gas Act to abandon a portion of the firm transportation service provided to Commission of Public Works, Laurens, South Carolina (Laurens) under Transco's Rate Schedule FT.

Transco states that under a service agreement dated February 1, 1992, Transco renders for Laurens firm transportation service under Transco's Rate Schedule FT. The service agreement sets forth the terms and conditions under which Transco provides firm transportation of 8,114 Dt of gas per day for Laurens. Transco explains that, although the firm transportation service is being rendered by Transco pursuant to Transco's blanket certificate authorization under part 284(G) of the Commission's regulations, Transco requires specific section 7(b) abandonment authorization because the subject FT service for Laurens was previously converted from firm sales service to firm transportation service under Transco's Rate Schedule FT pursuant to Transco's revised Stipulation and Agreement in Docket Nos. RP88–68, *et al.* Transco adds that the settlement provides that pre-granted abandonment shall not apply to such conversions (as further described in Article IV of the Service Agreement). Transco proposes to abandon 2,000 Dt/day of firm transportation service to Laurens effective November 1, 2004.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to

become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on August 20, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1798 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–436–000]

Williston Basin Interstate Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

August 5, 2004.

Take notice that on July 30, 2004, Williston Basin Interstate Pipeline Company (Williston Basin) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets to become effective September 1, 2004:

Eighteenth Revised Sheet No. 187
Sixth Revised Sheet No. 225
Seventh Revised Sheet No. 226
First Revised Sheet No. 227A.03
Second Revised Sheet No. 227B
Fifth Revised Sheet No. 232
Third Revised Sheet No. 252A.03
Third Revised Sheet No. 283C
Third Revised Sheet No. 740A

Williston Basin states that the proposed tariff changes are being submitted to make certain minor conforming changes to bring its FERC Gas Tariff into compliance with Order Nos. 2004, *et seq.*, and the Commission's Standards of Conduct rules under 18 CFR Part 358 of the Commission's Regulations.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1807 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–1860–001, et al.]

Cobb Electric Membership Corp., et al.; Electric Rate and Corporate Filings

August 4, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Cobb Electric Membership Corp.

[Docket No. ER01–1860–001]

Take notice that on July 12, 2004, Cobb Electric Membership Corp. (Cobb) submitted for filing with the Federal Energy Regulatory Commission its triennial updated market analysis in accordance with Appendix A of the Commission's June 22, 2001, Letter Order, and the Commission's May 13, 2004, order generically granting Cobb and similarly-situated entities an extension of time to file triennial market-based rate reviews. Cobb also submitted certain revisions to its Original FERC Rate Schedule No. 1 to incorporate the Market Behavior Rules set forth in 105 FERC ¶ 61,218 (2003).

Comment Date: 5 p.m. eastern time on August 16, 2004.

2. AllEnergy Marketing Company, LLC

[Docket No. ER04–1037–000]

Take notice that on July 23, 2004, AllEnergy Marketing Company, LLC filed a Notice of Cancellation of its FERC Electric Tariff, Original Volume No. 1, effective September 24, 2004.

Comment Date: 5 p.m. eastern time on August 20, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1782 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 696–013—Utah]

PacifiCorp; Notice of Availability of Environmental Assessment

August 5, 2004.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for surrender of the license for the American Fork Hydroelectric Project and has prepared a Environmental Assessment (EA) for the project. The project is located on American Fork Creek, near the City of American Fork, about three miles east of Highland, in Utah County, Utah. The project occupies about 28.8 acres of land within the Uinta National Forest, administered by the U.S. Forest Service, and approximately 2,000 feet of the project's flowline passes through the Timpanogos Cave National Monument, administered by the U.S. Department of the Interior, National Park Service.

The EA contains the staff's analysis of the potential environmental impacts of the application and concludes that surrendering the project, with the appropriate environmental protective measures, would not constitute a major Federal action that would significantly affect the quality of the human environment.

A copy of the EA is attached to a Commission order titled "Order Granting Surrender Application and Approving Project Removal Plan," which was issued August 4, 2004, and is available for review and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "elibrary" link. Enter the docket number (prefaced by P-) and excluding the last three digits, in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1803 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–377–000]

CenterPoint Energy Gas Transmission Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed Round Mountain & Helena Compression Expansion Project and Request for Comments on Environmental Issues

August 6, 2004.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Round Mountain & Helena Compression Expansion Project involving extension and operation of facilities by CenterPoint Energy Gas Transmission Company (CenterPoint) in Conway and Phillips Counties, Arkansas. The project would consist of the addition of 6,380 horsepower (hp) of compression to two existing compressor stations. CenterPoint states that the additional horsepower would enhance its system flexibility and reliability and provide additional firm transportation to a local distribution customer. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including how to participate in the Commission's proceedings.

Summary of the Proposed Project

CenterPoint seeks authorization from the Commission to expand the capacity of its facilities in Arkansas to supply an additional 70,000 dekatherms per day (Dth/d) of natural gas to a local distribution company, Arkansas Western Gas Company (AWG), over a 10 year period. CenterPoint's application was filed with the Commission under section 7(c) of the Natural Gas Act and subpart A of part 157 of the Commission's regulations.

To accomplish its project objectives, CenterPoint requests authority to install and operate:

- One 4,700-hp turbine compressor and appurtenant facilities at its Round Mountain Compressor Station in Conway County; and
- One 1,680-hp reciprocating compressor and appurtenant facilities at its Helena Compressor Station in Phillips County.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

The existing Round Mountain and Helena Compressor Stations are located on 6.5-acre and 4-acre fenced lots, respectively. All construction activities would take place within the fenced boundaries. Both compressor stations are surrounded by idle pastureland and mixed forest. Existing gravel access roads would not need improvement. Construction activities would be performed in accordance with the FERC's Upland Erosion Control, Revegetation, and Maintenance Plan and Wetland and Waterbody Construction and Mitigation Procedures.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than appendix 1 (maps), are available on the Commission's website at the "eLibrary" link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

Our [2] independent analysis of the issues will be presented in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

Currently Identified Environmental Issues

We have already identified two issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by CenterPoint. This preliminary list of issues may be changed based on your comments and our analysis.

- Potential noise impacts on nearby residents.
- Effect of compressor emissions on air quality.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EA and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal, and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your letter to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of Gas Branch 1.
- Reference Docket No. CP04–377–000.
- Mail your comments so that they will be received in Washington, DC on or before September 7, 2004.

The Commission strongly encourages electronic filing of comments. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created on-line.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an "intervenor." Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of any filing to the Secretary of the Commission, and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix 2).[3] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who own homes within distances defined in the Commission's regulations of certain aboveground facilities.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. To register for this service, go to *http://www.ferc.gov/esubscribenow.htm.*

Magalie R. Salas,

Secretary.

[FR Doc. E4–1795 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

[2] "We," "us," and "our" refer to the environmental staff of the Office of Energy Projects (OEP).

[3] Interventions may also be filed electronically via the Internet in lieu of paper. *See* the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP04–379–000, CP04–380–000, and CP04–381–000]

Pine Prairie Energy Center, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed Pine Prairie Energy Center, Request for Comments on Environmental Issues, and Site Visit

August 6, 2004.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Pine Prairie Energy Center involving construction and operation of facilities by Pine Prairie Energy Center, LLC (Pine Prairie) in Evangeline, Acadia, and Rapides Parishes, Louisiana. These

facilities would consist of approximately 21.47 miles of new 24-inch gas pipeline, 3 underground gas storage caverns, a compressor station with 48,000 horsepower of compression, 6 pipeline meter facilities and 7 pipeline interconnects. The EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with State law.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" was attached to the project notice Pine Prairie provided to landowners. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

Pine Prairie proposes to construct and operate the Pine Prairie Energy Center in Evangeline, Acadia, and Rapides Parishes, Louisiana. The proposal includes construction and operation of 3 solution-mined underground salt storage caverns, associated aboveground facilities, and connecting pipelines for the storage of up to 24.0 billion cubic feet (Bcf) of natural gas. The proposed and existing pipelines would connect the storage facility to ANR Pipeline Company, Florida Gas Transmission Company, Tennessee Gas Pipeline Company, Texas Eastern Transmission, L.P., Texas Gas Transmission LLC (Texas Gas) and Transcontinental Gas Pipe Line Corporation. Specifically, Pine Prairie seeks authority to construct and operate:

- A 60 acre gas storage site consisting of three underground salt dome storage caverns of 8 Bcf storage capacity each;
- A gas handling facility consisting of a compressor building with six 8,000 horsepower gas engine driven reciprocating compressors, dehydration facilities, and attendant control buildings and equipment;
- A brine disposal and raw water withdrawal site located on 10 acres of land. The site will include 4 withdrawal wells to obtain water to solution mine the storage caverns and 4 injection wells to dispose of the brine;
- The Mid Pipeline Corridor, consisting of 6.36 miles of dual 24-inch natural gas pipeline originating from the Gas Handling Facility to the Chalk Gathering System, an existing 24-inch natural gas pipeline;
- A service corridor containing 1.92 miles of dual 16-inch water pipelines will be collocated between the Gas Handling Facility and the brine disposal and raw water disposal site;
- The North Pipeline Corridor, consisting of 17.80 miles of the Chalk system north of the Mid Pipeline Corridor and will extent through Evangeline Parish into Rapides Parish;
- The South Pipeline Corridor, consisting of 16.49 miles of the Chalk system south of the Mid Pipeline Corridor extending through Evangeline Parish into Acadia Parish which would be looped with the installation of 11.24 miles of 24-inch natural gas pipeline;
- The TGT Lateral Pipeline Corridor, extending from the South Pipeline Corridor to the Texas Gas Interconnect, consisting of 0.7 mile of dual 24 inch natural gas pipeline;
- The East Lateral Pipeline Corridor, extending from the South Pipeline Corridor to the interconnect with Florida Gas Transmission, consisting of 3.17 miles of 24-inch natural gas pipeline; and
- A total of 6 meter stations would be constructed along with 7 pipeline interconnections and 5 contractor yards of approximately 10 acres each.

The general location of the project facilities is shown in appendix 1.[1] If you are interested in obtaining detailed maps of a specific portion of the project, send in your request using the form in appendix 3.

Land Requirements for Construction

Construction of the proposed facilities would require about 383.1 acres of land. Following construction, about 59.5 acres would be maintained as new aboveground facility sites. The remaining 323.6 acres of land would be restored and allowed to revert to its former use.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as "scoping". The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, State and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

In the EA we[2] will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils.
- Land use.
- Water resources, fisheries, and wetlands.
- Cultural resources.
- Vegetation and wildlife.
- Air quality and noise.
- Endangered and threatened species.
- Hazardous waste.
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

To ensure your comments are considered, please carefully follow the

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than appendix 1 (maps), are available on the Commission's Web site at the "eLibrary" link or from the Commission(s Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

[2] "We", "us", and "our" refer to the environmental staff of the Office of Energy Projects (OEP).

instructions in the public participation section below.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Pine Prairie. This preliminary list of issues may be changed based on your comments and our analysis.

- Brine disposal and raw water withdrawal from aquifers.
- Wetland impacts along the pipeline corridor.
- Air and noise quality impacts from operation of the compressor facility.
- Storage cavern and well casing integrity management.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EA/EIS and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative locations and routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your letter to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of Gas Branch 3.
- Reference Docket No. CP04–379–000, *et al.*
- Mail your comments so that they will be received in Washington, DC on or before September 7, 2004.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. However, the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created on-line.

We may mail the EA for comment. If you are interested in receiving it, please return the Information Request (appendix 4). If you do not return the Information Request, you will be taken off the mailing list.

The environmental staff of the Federal Energy Regulatory Commission will perform a site visit of the proposed facility locations. Anyone interested in participating in the field trip may attend, but they must provide their own transportation. The meeting location prior to the site visit is as follows:

Time/date	Meeting location	Facility locations
9 a.m., Thursday, August 19, 2004	The Pine Cone, 1017 Elm St., Pine Prairie, LA 70576.	Gas handling facility, brine disposal and raw water withdrawal site, and Mid Pipeline Corridor.
9 a.m., Friday, August 20, 2004	The Pine Cone, 1017 Elm St., Pine Prairie, LA 70576.	East Lateral, TGT Lateral, Meter and Regulator Sites.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an "intervenor". Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of any filing to the Secretary of the Commission, and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission(s Rules of Practice and Procedure (18 CFR 385.214) (see appendix 2).[3] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities. By this notice we are also asking governmental agencies, especially those in appendix 3, to express their interest in becoming cooperating agencies for the preparation of the EA.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/*

[3] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

EventCalendar/EventsList.aspx along with other related information.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1785 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Annual Charges Billing Fiscal Year 2004; Notice of Correction

August 6, 2004.

On July 30, 2004, the Commission issued the annual charges billings for Fiscal Year 2004. This statement of annual charges is issued pursuant to 18 CFR part 382 and covers the period October 1, 2003, through September 30, 2004. The Annual Charge Adjustment (ACA) unit charge included in the Gas Program Cost Analysis in accordance with 18 CFR 154.402(a) is corrected to read:

"The annual charges unit charge to be applied to rates in 2004 recovery of 2003 debit/credit and 2004 current year annual charge is $0.0019 per Dth. In accordance with section § 154.402(a), changes to the ACA must be filed annually to reflect the annual charge unit rate authorized by the Commission each fiscal year. If you need to change your ACA surcharge, use $0.0019 per Dth in your company's tariff, as it has been adjusted to include last year's debit/credit factor."

If further information is required, contact Fannie Kingsberry at 202–502–6108.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1790 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Settlement Agreement and Soliciting Comments

August 6, 2004.

Take notice that following settlement agreement has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Settlement Agreement on Resolution of Issues Related to Licensing of the Storage Project.

b. *Project No.:* P–2634–007.

c. *Date filed:* August 2, 2004.

d. *Applicant:* Great Lakes Hydro America, LLC.

e. *Name of Project:* Storage Project.

f. *Location:* On Ragged Stream, Caucomgomoc Stream, and West Branch and South Branch of the Penobscot River in the Counties of Somerset and Piscataquis, Maine. The project would not utilize federal lands.

g. *Filed Pursuant to:* Rule 602 of the Commission's Rules of Practice and Procedure, 18 CFR 385.602.

h. *Applicant Contact:* David Preble, Operations Manager, Great Lakes Hydro America, LLC, 1024 Central Street, Millinocket, Maine 04462, (207) 723–4341 x106.

i. *FERC Contact:* John Costello, (202) 502–6119, *john.costello@ferc.gov.*

j. *Deadline for Filing Comments:* 20 days from the issuance date of this notice; reply comments are due 30 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the Project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

k. Great Lakes (Great Lakes) Hydro America, LLC filed a settlement agreement on the resolution of issues related to the licensing proceeding for the Storage Project. Great Lakes filed this settlement agreement on behalf of Penobscot Indian Nation, Passamaquoddy Tribe, U.S. Department of the Interior, Bureau of Indian Affairs, U.S. Department of the Interior, Fish and Wildlife Service, U.S. Department of the Interior, National Park Service, Maine Department of Inland Fisheries and Wildlife, Maine Department of Conservation, Appalachian Mountain Club, American Whitewater, and New England FLOW. The settlement agreement includes provisions for project operations and measures to enhance aquatic and riparian habitat, manage wildlife resources, protect shorelines, improve recreational facilities, and provide public and tribal access.

l. A copy of the settlement agreement is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1791 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of FERC Staff Attendance at MISO Transmission Service/AFC Workshop

August 5, 2004.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meeting of the Midwest Independent Transmission System Operator, Inc. (MISO) Transmission Service/AFC Workshop noted below. The staff's attendance is part of the Commission's ongoing outreach efforts.

MISO Transmission Service/AFC Workshop—August 12, 2004, 10 a.m.–3 p.m. (c.s.t.), Lakeside Conference Center (directly across from MISO's headquarters), 630 West Carmel Drive, Carmel, IN 46032.

The discussions may address matters at issue in the following proceedings:

Docket No. RM01–12–000, Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design.

Docket No. EL02–65–000, *et al.*, Alliance Companies, *et al.*

Docket No. RT01–87–000, *et al.*, Midwest Independent Transmission System Operator, Inc.

Docket No. ER03–323, *et al.*, Midwest Independent Transmission System Operator, Inc.

Docket No. ER03–1118, Midwest Independent Transmission System Operator, Inc.

Docket No. ER04–691 and EL04–104, Midwest Independent Transmission System Operator, Inc., *et al.*

Docket No. ER04–375, Midwest Independent Transmission System Operator, Inc., *et al.*

Docket Nos. EL04–43 and EL04–46, *Tenaska Power Services Co. and Cargill Power Markets, LLC* v. *Midwest Independent Transmission System Operator, Inc.*

The meeting is open to the public.

For more information, contact Patrick Clarey, Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov*, or Christopher Miller, Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission at (317) 249–5936 or *christopher.miller@ferc.gov*.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1799 Filed 8–11–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

August 6, 2004.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of exempt and prohibited off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive an exempt or prohibited off-the-record communication relevant to the merits of a contested on-the-record proceeding, to deliver a copy of the communication, if written, or a summary of the substance of any oral communication, to the Secretary.

Prohibited communications will be included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications will be included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of prohibited and exempt communications recently received in the Office of the Secretary. The communications listed are grouped by docket numbers. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary (FERRIS) link. Enter the docket number excluding the last three digits in the docket number field to access the document. For Assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

PROHIBITED

Docket number	Date filed	Presenter or requester
1. ER04–510–003, EL04–88–001, EL04–88–002	7–22–04	Robert Carey.
2. Project No. 1390–005	8–3–04	Katie Maloney Bellomo.

EXEMPT

Docket number	Date filed	Presenter or requester
1. CP04–223–000	7–22–04	Fran Lowell [1].
2. CP04–223–000	8–4–04	Capt. William C. Reed.
3. CP04–223–000	8–4–04	David Sanders.
4. Project No. 1971–000	7–28–04	Brian J. Brown.

[1] Project Meeting Minutes.

Magalie R. Salas,
Secretary.
[FR Doc. E4–1792 Filed 8–11–04; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER04–699–000, ER03–1272–002, ER98–4410–000, ER98–4410–001, ER98–4410–002, EL02–101–000, EL02–101–001, and EL02–101–002]

Entergy Services, Inc., CLECO Power, LLC Dalton Utilities Entergy Services, Inc., Georgia Transmission Corporation, JEA, MEAG Power, Sam Rayburn G&T Electric Cooperative, Inc., Southern Company Services, Inc., City of Tallahassee, FL; Notice of Comment Period

August 6, 2004.

On July 29–30, 2004, the Federal Energy Regulatory Commission (FERC) held a technical conference to discuss issues raised by Entergy Services Inc.'s (Entergy) proposal in Docket No. ER04–699–000 to, among other things, establish an Independent Coordinator of Transmission (ICT), as well as to address additional proceedings currently pending before the Commission that raise issues of transmission access on the Entergy system. Members of the FERC, the Louisiana Public Service Commission, the Arkansas Public Service Commission, the Mississippi Public Service Commission and the Council of the City of New Orleans, as well as the staff of the Public Utilities Commission of Texas, participated in the discussions. In addition, the Commission heard from speakers representing various market participants on Entergy's system.

Any party wishing to provide additional or supplemental comments as a result of issues discussed at the conference should file such comments no later than August 31, 2004. Comments may be filed electronically via the Internet in lieu of filing by paper. See 18 CFR 385.2001(a)(l)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link. For additional information, please contact Anna Cochrane at (202) 502–6357; *anna.cochrane@ferc.gov.*

Magalie R. Salas,
Secretary.
[FR Doc. E4–1788 Filed 8–11–04; 8:45 am]
BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OW–2004–0017, FRL–7800–6]

Agency Information Collection Activities: Proposed Collection; Comment Request; Combined Sewer Overflow Control Policy, EPA ICR Number 1680.03, OMB Control Number 2040–0170

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 12, 2004.

ADDRESSES: Submit your comments, referencing docket ID number OW–2004–0017 to EPA online using EDOCKET (our preferred method), by email to *OW-DOCKET@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket (Mail Code 4101T), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Timothy J. Dwyer, Environmental Protection Agency, Water Permits Division (4203M), 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–0717; fax number: 202–564–6392; e-mail address: *dwyer.tim@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number OW–2004–0017, which is available for public viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov./edocket.*

Affected entities: Entities potentially affected by this action are approximately 770 municipalities with combined sewer systems, which are covered by EPA's Combined Sewer Overflow (CSO) Control Policy.

Title: Combined Sewer Overflow Control Policy (OMB Control No. 2040–0170; EPA ICR No. 1680.03) expiring on October 31, 2004.

Abstract: EPA is proposing to continue its ICR for the Combined Sewer Overflow (CSO) Control Policy. The ICR was approved in April 1994. The first renewal was approved in September 1997; the second in October 2001. This renewal ICR includes the burden associated with documenting implementation of the nine minimum controls identified in the CSO control policy, public notification of CSO events and their impacts, developing and submitting long-term CSO control plans (LTCPs), and post-construction compliance monitoring.

Combined sewer systems (CSSs) serve approximately 770 municipalities, primarily in the Northeast and Great Lakes regions. This number is smaller than that in the former ICR largely

because the Agency has better data on the number of municipalities with combined sewer systems nationwide. CSOs occur when these systems overflow and discharge to receiving waters prior to treatment in a publicly owned treatment works (POTW).

The CSO Control Policy, published on April 19, 1994 (59 FR 18688), is a national framework for controlling CSOs through the National Pollutant Discharge Elimination System (NPDES) permitting program. The Policy represents a comprehensive national strategy to ensure that municipalities with CSSs, NPDES permitting authorities, water quality standards authorities, and the public engage in a comprehensive and coordinated planning effort to achieve cost-effective CSO controls that ultimately need appropriate health and environmental objectives, including compliance with water quality standards. In December 2000, the Wet Weather Water Quality Standards Act amended the Clean Water Act by adding Section 402(q). Among other things, Section 402(q)(1) requires that permits, orders, and decrees issued after its date of enactment, shall conform to the EPA's 1994 CSO Control Policy.

Among the provisions in the CSO Policy are the "nine minimum controls" (NMC), which are technology-based actions or measures designed to reduce the magnitude, frequency, and duration of CSOs and their effects on receiving water quality. The CSO Control Policy provided for implementation of the NMC by January 1, 1997.

One of the NMC is public notification of CSO occurrences and impacts. Public notification is of particular concern at beach and recreation areas directly or indirectly affected by CSOs, where public exposure is likely to be significant. That burden continues to be included in this renewal.

The CSO Control Policy also contains a provision for the development of long-term control plans. The policy delineates that permit writers require permittees to develop a long-term plan within two years of the issuance of a NPDES permit or other enforceable mechanism containing such a requirement. The core of the plan is the development and evaluation of long-term control alternatives. One of the elements of the long-term plan is the development of a post-construction compliance monitoring program to be implemented when selected controls are completed. OMB's approval of the initial ICR for the CSO Control Policy recommended that the renewal ICRs include EPA's best estimate of the burden associated with a reasonable and targeted compliance monitoring program.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Burden Statement: Based on the information collection requirements in the existing ICR, the estimated burden reflected in this ICR is 1,754,877 hours and a cost of $61,964,707.

Of this total, the portion for municipalities with combined sewer systems is 1,699,696 hours at a cost of $60,016,265 including start-up costs of $182,125 for the third party notification under the Nine Minimum Controls (NMC) in the CSO Policy. The estimated burden on each of 585 municipalities for DMR reporting and recordkeeping is 417 hours and $14,724. The estimated burden on each of 490 municipalities for NMC reporting and long-term control plan development and submission is 3,011 hours and $106,313 and for third-party notification, 27 hours and $940.

The estimated burden for Federal and State governments is 4,894 hours and $172,807 and 55,181 hours and $1,948,441, respectively. This includes the burden associated with reviewing the DMRs, the NMC documentations, and the long-term control plans submitted by the respondents, and reissuing NPDES permits or issuing other enforceable mechanisms to municipalities with CSSs to implement the CSO Control Policy. The annual average burden for Federal and State review of DMRs, NMC documentations, and long-term control plans is 1,325 hours and $46,774 and 15,807 hours and $532,722, respectively. The annual average burden associated with reissuing NPDES permits or issuing other enforceable mechanisms to CSO municipalities is 307 hours and $10,828 for the Federal government and 3,307 hours and $116,758 for State governments.

The estimated burden on the States to report summary information to EPA for oversight of the EPA's CSO Control Policy and for GPRA purposes is 1,200 hours and $42,351.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: August 5, 2004.

James A. Hanlon,

Director, Office of Wastewater Management.

[FR Doc. 04–18460 Filed 8–11–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7798–8]

Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement concerning the Imperial Refining Superfund Site, with Hogan Family, L.L.C.

The settlement requires the settling parties to pay a total of $300,575.29

($292,000.00 to finance response actions plus $8,575.29 in interest) as payment of response costs to the Hazardous Substances Superfund. The settlement includes a covenant not to sue pursuant to section 107 of CERCLA, 42 U.S.C. 9607.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to this notice and will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at 1445 Ross Avenue, Dallas, Texas 75202–2733.

DATES: Comments must be submitted on or before September 13, 2004.

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at 1445 Ross Avenue, Dallas, Texas 75202–2733. A copy of the proposed settlement may be obtained from Lydia Johnson, 1445 Ross Avenue, Dallas, Texas 75202–2733 or by calling (214) 665–8419. Comments should reference the Imperial Refining Superfund Site, Carter County, Oklahoma, and EPA Docket Number 06–06–2003, and should be addressed to Lydia Johnson at the address listed above.

FOR FURTHER INFORMATION CONTACT: I-Jung Chiang, 1445 Ross Avenue, Dallas, Texas 75202–2733 or call (214) 665–2160.

Dated: July 21, 2004.

Lynda F. Carroll,

Acting Regional Administrator (6RA).

[FR Doc. 04–18461 Filed 8–11–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7800–8]

Notice of Proposed Administrative Consent Agreement and Final Order Pursuant to Section 309(g)(4) of the Clean Water Act: In the Matter of Deer Lodge Park L.L.C.

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 309(g)(4)(A) of the Clean Water Act, ("CWA"), 33 U.S.C. 1319(g)(4)(A), notice is hereby given of a proposed Consent Agreement and Final Order ("CA/FO"), which resolves penalties for alleged violations of sections 301(a) of the CWA, 33 U.S.C. 1311(a). The respondent to the CA/FO is Deer Lodge Park L.L.C., a Nevada corporation ("Respondent"). Through the proposed CA/FO, Respondent will pay $3,000 as a penalty for alleged violations involving its failure to obtain coverage under either a CWA National Pollutant Discharge Elimination System (NPDES) individual permit, or the NPDES General Permit #NVR10000I for Storm Water Discharges From Construction Activities for Indian Country within the State of Nevada (the "NPDES Construction General Permit"), prior to engaging in construction activity associated with development of the Deer Lodge Park residential subdivision located on individual Indian allotment land in Douglas County, Nevada.

DATES: For 30 days following the date of publication of this notice, the Agency will receive written comments relating to the proposed CA/FO.

ADDRESSES: Requests for copies of the proposed CA/FO should be addressed to: Richard Campbell, Attorney Advisor, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, Mailcode: ORC–2, San Francisco, CA 94105.

Comments regarding the proposed CA/FO should be addressed to: Danielle Carr, Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Comments should reference the following information:

Case Name: In the Matter of Deer Lodge Park L.L.C.

Docket Number: CWA–9–2004–0002.

FOR FURTHER INFORMATION CONTACT: Richard Campbell at the above address or by telephone at (415) 972–3870, or by e-mail at *campbell.rich@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Respondent Deer Lodge Park L.L.C. is an "operator", as that term is defined at 40 CFR Part 122, in control of site specifications for the Deer Lodge Park residential subdivision. Construction activities associated with development of the Deer Lodge Park residential subdivision were unpermitted under either an individual NPDES permit or a NPDES Construction General Permit for six months in 2003. During this period, construction activity at the Deer Lodge Park site involved grading of roads, installation of a water tank, and installation of a well site. Storm water from the Deer Lodge Park construction site drains to a tributary of the East Fork Carson River. Pursuant to the proposed CA/FO, Respondent has consented to the assessment of a $3,000 penalty in this matter, and has certified that it will obtain coverage under a NPDES permit for construction activities at Deer Lodge Park.

II. General Procedural Information

Any person who comments on the proposed CA/FO shall be given notice of any hearing held and a reasonable opportunity to be heard and to present evidence. If no hearing is held regarding comments received, any person commenting on this proposed CA/FO may, within 30 days after the issuance of the final order, petition the Agency to set aside the CA/FO, as provided by section 309(g)(4)(C) of the CWA, 33 U.S.C. 1319(g)(4)(C). Procedures by which the public may submit written comments or participate in the proceedings are described in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 CFR Part 22.

Dated: July 28, 2004.

Alexis Strauss,

Director, Water Division, Region IX.

[FR Doc. 04–18462 Filed 8–11–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–04–58–C (Auction No. 58); DA 04–2451]

Revised Inventory for Broadband PCS Spectrum Auction Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document revises the Auction No. 58 inventory to include eight additional licenses, and seeks comment on procedural issues related to the auction of these additional licenses.

DATES: Comments are due on or before August 17, 2004, and reply comments are due on or before August 20, 2004. Auction No. 58 is scheduled to begin January 12, 2005.

ADDRESSES: Comments and reply comments must be sent by electronic

mail to the following address: *auction58@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: *For legal questions:* Scot Mackoul (202) 418–0660. *For general auction questions:* Jeff Crooks (202) 418–0660 or Lisa Stover (717) 338–2888. *For service rule questions, contact the Mobility Division, Wireless Telecommunications Bureau, as follows:* Erin McGrath, (202) 418–0620; JoAnn Epps, (202) 418–1342; or Dwain Livingston, (202) 418–1338.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction No. 58 Revised License Inventory Public Notice* released on August 3, 2004. The complete text of the *Auction No. 58 Revised License Inventory Public Notice,* including attachments is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Auction No. 58 Revised License Inventory Public Notice* may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. ("BCPI"), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone (202) 488–5300, facsimile (202) 488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number (for example, FCC 00–313 for the C/F Block Sixth Report and Order). The *Auction No. 58 Revised License Inventory Public Notice* is also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/58/.*

I. Background

1. In the *Auction No. 58 Comment Public Notice,* 69 FR 40632 (July 6, 2004), the Wireless Telecommunications Bureau ("Bureau") announced the auction of 234 licenses in the broadband Personal Communication Service scheduled to commence on January 12, 2005 ("Auction No. 58"). The Bureau also sought comment on procedures for the auction of those licenses. By the *Auction No. 58 Revised License Inventory Public Notice,* the Bureau revises the auction inventory to also include eight D and E block broadband PCS licenses. Under the Commission's Part 24 rules, broadband PCS spectrum in the D and E blocks is not subject to the entrepreneur eligibility restrictions. These eight additional licenses, as well as the other licenses to be offered in Auction No. 58, are identified in Attachment A of the *Auction No. 58 Revised License Inventory Public Notice.* The *Auction No. 58 Revised License Inventory Public Notice* seeks comment on procedural issues related to the auction of the eight additional D and E block licenses. Parties that submitted comments and/or reply comments in response to the *Auction No. 58 Comment Public Notice* should not resubmit those filings. Parties should submit comments regarding the auction procedures only to the extent that they relate to the new licenses included in the auction inventory.

II. Reserve Price or Minimum Opening Bid

2. For the eight additional D and E block licenses offered in Auction No. 58, the Bureau proposes to use the same formula for calculating minimum opening bids as proposed in the *Auction No. 58 Comment Public Notice.* Specifically, for Auction No. 58, the Bureau has proposed to calculate minimum opening bids on a license-by-license basis using formulas based on bandwidth and license area population. Furthermore, the Bureau has proposed to differentiate these formulas based on the population of each license area.

Population ≥ 2,000,000: $0.50 * MHz * License Area Population

Population ≥ 500,000: $0.25 * MHz * License Area Population

Population <500,000: $0.15 * MHz * License Area Population

The specific minimum opening bid for each license available in Auction No. 58 is set forth in Attachment A of the *Auction No. 58 Revised License Inventory Public Notice.* The Bureau seek comment on these proposals in the same manner as in the *Auction No. 58 Comment Public Notice,* but in this case, only as these proposals relate to the eight licenses added to the auction inventory. Parties that submitted comments and/or reply comments regarding the reserve price or minimum opening bid in response to the *Auction No. 58 Comment Public Notice* need not submit new comments unless it relates to the addition of the eight licenses.

III. Upfront Payments and Initial Maximum Eligibility for Each Bidder

3. For the eight additional D and E block licenses offered in Auction No. 58, the Bureau proposes to use the same formula for determining upfront payments as previously proposed in the *Auction No. 58 Comment Public Notice.* Specifically, for Auction No. 58, the Bureau has proposed to calculate upfront payments on a license-by-license basis using a formula based on bandwidth and license area population:

$0.05 * MHz * License Area Population

The specific proposed upfront payment for each license available in Auction No. 58 is set forth in Attachment A of the *Auction No. 58 Revised License Inventory Public Notice.* The Bureau further proposed that the amount of the upfront payment submitted by a bidder will determine the maximum number of bidding units on which a bidder may place bids. This limit is a bidder's initial eligibility. Each license is assigned a specific number of bidding units equal to the upfront payment listed in Attachment A of the *Auction No. 58 Revised License Inventory Public Notice,* on a bidding unit per dollar basis. This number does not change as prices rise during the auction. A bidder's upfront payment is not attributed to specific licenses. Rather, a bidder may place bids on any combination of licenses as long as the total number of bidding units associated with those licenses does not exceed its current eligibility. Eligibility cannot be increased during the auction. Thus, in calculating its upfront payment amount, an applicant must determine the maximum number of bidding units it may wish to bid on (or hold high bids on) in any single round, and submit an upfront payment covering that number of bidding units. The Bureau seeks comment on these proposals as they relate to the eight licenses added to the auction inventory.

IV. Other Auction Procedural Issues

4. In the *Auction No. 58 Comment Public Notice,* the Bureau also set forth and sought comment on the following proposals relating to auction structure and bidding procedures: (i) Simultaneous multiple-round auction design; (ii) activity rules; (iii) activity rule waivers and reducing eligibility; (iv) information relating to auction delay, suspension or cancellation; (v) round structure; (vi) minimum acceptable bids and bid increments; (vii) high bids and tied bids; (viii) information regarding bid withdrawal and bid removal; and (ix) auction stopping rule. For the additional licenses in Auction No. 58, the Bureau proposes to use the same auction structure and bidding procedures proposed in the *Auction No. 58 Comment Public Notice.* The Bureau seeks comment on these proposals as they relate to the eight additional licenses included in Attachment A of the *Auction No. 58 Revised License Inventory Public Notice.*

V. Conclusion

5. Comments are due on or before August 17, 2004, and reply comments

are due on or before August 20, 2004. The Bureau requires that all comments and reply comments be filed electronically. Comments and reply comments must be sent by electronic mail to the following address: *auction58@fcc.gov*. The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 58 Comments and the name of the commenting party. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. In addition, the Bureau requests that commenters fax a courtesy copy of their comments and reply comments to the attention of Kathryn Garland at (717) 338–2850.

6. This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules.

Federal Communications Commission.

Gary Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 04–18359 Filed 8–11–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[MM Docket No. 04–261; FCC 04–175]

Violent Television Programming and Its Impact on Children

AGENCY: Federal Communications Commission.

ACTION: Notice of inquiry.

SUMMARY: In this document, the Commission seeks comment on issues relating to the presentation of violent programming on television and its impact on children.

DATES: Comments are due September 15, 2004; reply comments are due October 15, 2004.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. For further filing information, *see* **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Ben Golant, (202) 418–7111 or *Ben.Golant@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Notice of Inquiry, FCC 04–175, adopted July 15, 2004 and released July 28, 2004. The full text of the Commission's NOI is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257) at its headquarters, 445 12th Street, SW., Washington, DC 20554, or may be purchased from the Commission's copy contractor, Qualex International, (202) 863–2893, Portals II, Room CY-B402, 445 12th St., SW., Washington, DC 20554, or may be reviewed via Internet at *http://www.fcc.gov/mb*.

Synopsis of the Notice of Inquiry

I. Introduction

1. We initiate this *Notice of Inquiry* ("*NOI*") to seek comment on issues relating to the presentation of violent programming on television and its impact on children. Violent television programming content has been a matter of private and governmental concern and discussion from at least the early 1950s. Congress' response, in 1996, was adoption of section 551 of the Telecommunication Act 1996, which resulted in the Commission's implementation of the companion elements of the voluntary television rating system and associated "V-chip" technology in 1998. More recently, the Commission has received continuing expressions of Congressional concern with respect to violent programming. On March 5, 2004, thirty-nine members of the U.S. House of Representatives, Committee on Energy and Commerce, requested the Commission to begin a "Notice of Inquiry on the issue of excessively violent broadcast television programming and its impact on children." This proceeding is designed to be responsive to these concerns and to update the record on issues related to programmatic violence.

2. Through this proceeding we seek comment and information along the following lines of inquiry. How much violent programming is there, and what are the trends? What are the effects of viewing violent programming on children and other segments of the population? If particular portrayals of violence are more likely to cause deleterious effects than others, what specific kinds of programming should be the focus of any further public policymaking in this area? Should any further public policymaking address all violence or just excessive or gratuitous violence, and how should that be defined? Are the ratings system and the V-chip accomplishing their intended purpose, or are there additional mechanisms that might be developed to control exposure to media violence? Finally, are there legal constraints on either Congress or the Commission to regulate violent programming?

II. Discussion and Request for Comment

A. Incidence of Violent Programming

3. We seek specific information concerning how much televised violence there is on broadcast and non-broadcast television and whether the amount of violent programming is increasing or decreasing. The National TV Violence Study, which appears to be of the most extensive content analyses to date, involving the efforts of more than 300 people recording and watching more than 10,000 hours of television programming from 1994 to 1997, indicates that more than half of all television programming contains violence. More specifically, during the period of the study, the proportion of programming with violence consistently hovered around 60%. During prime time, the proportion rose from 53% to 67% on broadcast networks, and from 54% to 64% on basic (*i.e.*, non-premium) cable channels. In addition, cartoons include an average of approximately one "high-risk" portrayal of violence per cartoon, as categorized by the researchers. There have been more recent reports on television violence. For example, the Parents Television Council ("PTC") conducted a content study finding that on all the television networks combined, violence was 41% more frequent during the 8 p.m. Family Hour in 2002 than in 1998 and during the second hour of prime time (9–10 p.m.), violence was 134.4% more frequent in 2002 that in 1998.

4. We seek additional information on the frequency of televised violence. The National TV Violence Study reports the results of study during the three-year period 1994–1997. What more recent information, aside from the PTC Study noted above, is available about the incidence of violence on television programming? What are the trends? Are there differences between broadcast and non-broadcast media (*i.e.*, cable and satellite)? Are there differences between

premium and non-premium channels on cable or satellite?

B. Effects of Viewing Violent Programming

5. At its core, concern about media violence derives from concern about deleterious effects, particularly on children, that may result from exposure to it. Over the course of several decades, much research has been developed to examine and study these effects. Much of the research within the public health and scientific communities suggests that exposure to media violence can be associated with certain negative effects. Three types of studies have generally been described in the literature; (1) field experiments in which subjects are shown video programming with their short-term post-viewing behavior monitored by researchers; (2) cross-sectional studies involving a survey of a sample of individuals at one point in time and their conduct correlated with the amount and type of their television viewing; and (3) longitudinal studies that survey the same group of individuals at different times over many years to determine the effects of television viewing on subsequent behavior. Through these studies efforts have been made to establish a cause and effect relationship between the viewing of "violent" programming by "children" and subsequent aggressive behavior on the part of these individuals. Various definitions of violence and various age groups have been involved. Some of the studies also involve the effects of television viewing of all types rather than just violent programming. Some involve the behavior of college-age or older viewers. The researchers have tended to focus on three possible harmful effects: (1) Increased antisocial behavior, including imitations of aggression or negative interaction; (2) desensitization to violence; and (3) increased fear of becoming a victim of violence.

6. A year 2000 review of the scientific research on the effects of entertainment media violence on children, which appears as part of the Federal Trade Commission's report on *Marketing Violent Entertainment to Children,* summarized the research as follows:

> A majority of the investigations into the impact of media violence on children find that there is a high *correlation* between exposure to media violence and aggressive and at times violent behavior. In addition, a number of research efforts report that exposure to media violence is correlated with increased acceptance of violent behavior in others, as well as an exaggerated perception of the amount of violence in society. Regarding causation, however, the studies appear to be less conclusive. Most researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence. Although a consensus among researchers exists regarding the empirical relationships, significant differences remain over the interpretation of these associations and their implications for public policy.

A 2001 report from the United States Surgeon General's 2001 *Youth Violence: A Report of the Surgeon General* summarized the research thus:

> In sum, a diverse body of research provides strong evidence that exposure to violence in the media can increase children's aggressive behavior in the short term. Some studies suggest that long-term effects exist, and there are strong theoretical reasons why this is the case. But many questions remain regarding the short- and long-term effects of media violence, especially on violent behavior. Despite considerable advances in research, it is not yet possible to describe accurately how much exposure, of what types, for how long, at what ages, for what types of children, or in what types of settings will predict violent behavior in adolescents and adults.

Research has continued since the completion of these two Reports, including new longitudinal studies buttressing the conclusion that childhood exposure to media violence lasts into adulthood and increases aggressive behavior. In addition, researchers have developed new methods of measuring the impact of exposure to media violence on children, including MRI brain mapping research conducted at the Indiana University School of Medicine and elsewhere. According to testimony given in 2003 before the Senate Committee on Commerce, Science & Transportation, a comprehensive bibliography of research and publications in this field includes 1,945 reports on children and television, approximately 600 of which deal with the issue of TV violence.

7. As indicated above, numerous studies have demonstrated the harmful effects of media violence on children. We seek comment on any additional recent research in the field. We seek additional comment on the debate and how the private sector, members of the public, and academia are continuing to address the net effects of media violence. Is there a correlation between exposure to violence and aggressive behavior? If so, what are the implications? Are there particular harms children suffer as a result of exposure to violent programming? What other factors contribute to observed aggressive behavior? Do depictions of violence in video programming have an identifiably different effect on children or adults than do descriptions of violence in other media, including print? How important is exposure to electronic media violence relative to other sources of exposure; *i.e.*, does watching Wile E. Coyote fall off a cliff in a cartoon have more or less an impact on a child's psyche than reading about Hansel and Gretel forcing a witch into a hot oven in Grimm's fairy tales? Are there countervailing benefits that flow from televised violence? Does the inclusion of violent events in fictional accounts help individuals understand and process actual incidences of violence they may encounter, experience, or learn of? Does violence serve any artistic function that should be considered, or are all depictions of violence necessarily gratuitous?

C. Defining Violent or Excessively or Gratuitously Violent Programming for Public Policy Purposes

8. The above discussion assumes a well established definition of violence in terms of measuring both the amount and effect of violent programming. This is not necessarily the case. There are definitional difficulties because "not all violence is created equal." From a public policy standpoint, is there a need to define all violence, or simply gratuitous or excessive violence?

9. For the purpose of determining, as a general matter, whether a program contains violence, researchers have used broad definitions. For example, one researcher defined violence as "the overt expression of force intended to hurt or kill" in a content analysis conducted in the 1960s as part of the National Commission on the Causes and Prevention of Violence. The National TV Violence Study defined violence as "any overt depiction of a credible threat of physical force or the actual use of such force intended to physically harm an animate being or group of beings. Violence also includes certain depictions of physically harmful consequences against an animate being or group that occur as a result of unseen violent means." The UCLA Violence Reports defined violence as "the act of, attempt at, physical threat of or the consequences of physical force." As the *1997 TV Violence Report* explains, such broad definitions "include violence, cartoon violence, slapstick violence—anything that involves or immediately threatens physical harms of any sort, intentional or unintentional, self-inflicted or inflicted by someone or something else." We seek comment on whether these definitions are appropriate.

10. At the same time, however, researchers have often attempted to identify the context, or qualitative nature, of a portrayal of violence. The *1997 TV Violence Report* explains:

> While parents, critics and others complain about the problem of violence on television, it is not the mere presence of violence that is the problem. If violence alone was the problem and V-chips or other methods did away with violent scenes or programs, viewers might never see a historical drama like Roots or such outstanding theatrical films as Beauty and the Beast, The Lion King, Forrest Gump and Schindler's List. In many instances, the use of violence may be critical to a story that actually sends an anti-violence message. Some important stories, such as Shakespeare's Hamlet, the history of World War II or the life of Abraham Lincoln, would be impossible to convey accurately without including portrayals of violence.
>
> For centuries, violence has been an important element of storytelling, and violent themes have been found in the Bible, The Iliad and The Odyssey, fairy tales, theater, literature, film and, of course, television. Descriptions of violence in the Bible have been important for teaching lessons and establishing a moral code. Lessons of the evils of jealousy and revenge are learned from the story of Cain and Abel. Early fairy tales were filled with violence and gruesomeness designed to frighten children into behaving and to teach them right from wrong. It was only when fairy tales were portrayed on the big screen by Walt Disney and others that the violence contained in the stories was substantially sanitized.

In other words the study suggests, "[t]he issue is not the mere presence of violence but the nature of violence and the context in which it occurs. Context is key to the determination of whether or not violence is appropriate." The National TV Violence Study similarly emphasizes that "the way in which violence is presented helps to determine whether a portrayal might be harmful to viewers."

11. But distinguishing one form of violence from another based on context is a difficult exercise. Again, in explaining how the researchers involved in the UCLA violence studies determined which programs raised "concerns" about violence, the *1997 TV Violence Report* illustrates the problem:

> No matter how well the definitions were drawn, there would be those who felt that some aspect of violence should or should not have been included. Almost everyone has his or her own definition of violence. People have often attempted to validate or invalidate quantitative research based on how much the scholar's definition resembles their own. Animation for children is a good example of this phenomenon. Consider a cartoon in which a character is hit over the head with a two-by-four, a funny sound effect is heard, the character shakes his head and merrily continues on his way. Some people might consider this the worst type of violence because it is unrealistic, there are no consequences and it might encourage children to imitate it precisely because it shows no consequences. Others feel they watched these cartoons growing up and did not imitate them because they knew these cartoons obviously were not "real." Scholars have had to decide whether to count this type of violence and usually have included it. Anyone who feels this inclusion is silly would reject the entire definition and might ignore the conclusions of the research. The same is true with slapstick humor. Sports programming provides yet another example. Many feel that violent spectator sports such as football or hockey make violence an acceptable or even desirable part of American life. Whether to count unrealistic cartoon violence, slapstick humor or sports within a definition of violence is itself a difficult decision.

We seek comment on these issues.

12. Against the backdrop of these definitional difficulties, what kinds of portrayals of violence are of greatest concern, particularly with respect to children? The National TV Violence Study states that "[i]f the consequences of violence are demonstrated, if violence is shown to be regretted or punished, if its perpetrators are not glamorized, if the act of violence is not seen as justifiable, if in general violence is shown in a negative light, then the portrayal of violence may not create undesirable consequences. But if violence is glamorized, sanitized or made to seem routine, then the message is that it is an acceptable, and perhaps even desirable, course of action." More specifically, the National TV Violence Study indicates that the portrayals that pose the greatest risk for learning aggression contain attractive perpetrators, morally justified reasons for engaging in violence, repeated incidents of violence that appear realistic, violence that is rewarded or unpunished, and violence that does not show harm or pain to a victim or is presented in a humorous context. According to the study, portrayals that pose the greatest risk for desensitization contain repeated incidents of violence or violence presented in a humorous context. Portrayals that pose the greatest risk for audience fear contain attractive victims, violence that appears unjustified, repeated and realistic, and unpunished. In addition, the *1997 TV Violence Report* provides as examples of "inappropriate or improper uses of violence" those "which glorify the act or teach that violence is always the way to resolve conflict." That report further states that "the consequences of violence should be shown and those persons using violence inappropriately should be punished. We would also note that when violence is used realistically, it is more desirable to accurately portray the consequences than to sanitize the violence in a manner designed to make it acceptable." On the other hand, some might argue that a television program such as "The Three Stooges" does not pose a great risk to children even if the violence is presented humorously and without obvious consequences. Similarly, some might argue that more graphic violence is potentially more harmful to children than violence in which, for example, a body falls from a gunshot wound but the wounds are not shown. We seek additional comment on the types of portrayals that are of greatest concern, particularly with respect to children.

13. How much televised violence is portrayed in a way that is most likely to harm children? For example, the National TV Violence Study states that 40% of the violent incidents studied were initiated by characters with qualities that make them good role models; 70% of violent scenes do not show penalty or remorse for violence at the time it occurs; roughly half of violent incidents do not show physical harm or pain; at least 40% of violent scenes include humor. The UCLA reports also identify particular shows that raised "concerns" about violence, according to a variety of contextual factors. We seek additional information on what type of programming is potentially the most damaging, and how frequently it occurs.

14. As we consider definitional issues, we also ask commenters to identify with precision the age groups that qualify as "children" when they discuss whether violent programming is harmful to them. Some scholarship suggests that children under the age of seven or eight are especially impressionable because they have difficulty distinguishing between fantasy and reality. We seek additional information on research that evidences and explains the particular age groups that are of concern.

15. Finally, in the context of possible regulation in this area, we note that members of the House Commerce Committee have asked the Commission to examine whether it would be in the public interest for the agency to define "excessively violent programming that is harmful to children," and if so, how we might do so. We also seek comment on how such a standard could be implemented in a manner that is both clear to the industry and practical to administer. We seek comment on these issues to be responsive to the Committee's concerns.

D. TV Parental Guidelines and V-Chip

16. A regulatory system already exists to help parents and viewers control the exposure of children to media violence. The television industry rates programming using the TV Parental Guidelines, and encodes programming accordingly; in addition, the Commission has required that, by January 1, 2000, all television sets manufactured in the United States or shipped in interstate commerce with a picture screen of thirteen inches or larger be equipped with a "V-chip" that can be programmed to block violent, sexual, or other programming that parents believe harmful to their children.

17. We seek comment on the status of the existing rating and V-chip system as tools to help parents and viewers screen out violence. To what extent is programming in fact rated, using both the age-based ratings, and the additional content labels for violence? Are the ratings consistent and accurate? A 1998 Kaiser Family Foundation study indicates that, during the first year the ratings system was in use, only 20% of programs that contained violence, sexual material, or adult language actually used the appropriate content label. This same study found that 79% of violent programming is not specifically rated for violence." Moreover, a 2001 Kaiser Family Foundation study indicates that 40% of parents who use the rating system do not believe programs are rated accurately. According to that study, more than half of all parents use the ratings system to decide what programming that their children may watch. In light of these findings, we seek comment on whether the lack of a content rating for violence renders ineffective any technology-based blocking mechanism, built into television sets, designed to limit violent programming.

18. We seek comment on these findings of the Kaiser Family Foundation. Is more recent information available on these issues? To what extent is use being made of the rating system? Do the TV Parental Guidelines now in use give parents sufficient information to make educated programming decisions for their children?

19. We also seek comment on the usefulness of the V-chip. Although as many as 40% of parents have television sets equipped with a V-chip, more than half of them are not aware of it, and two thirds of those who are do not use it. The Kaiser Foundation, in a recent study, has found that parents have not used the V-Chip even after a concerted effort to inform them about it. We seek comment on recent initiatives to educate parents about the V-Chip's availability. What can be done to enhance the usefulness of the V-chip? Are there ways to improve the ratings system?

E. Possible New Regulatory Solution: "Safe Harbor"

20. If the TV Parental Guidelines and V-chip are not adequate to protect children from any identifiable dangers of exposure to media violence, what other mechanisms are available? In their recent letter, members of the House Commerce Committee specifically asked how the Commission "might restrict broadcast of 'excessively violent programming that is harmful to children' during the hours when children are likely to be a substantial part of the viewing audience, so that it might supplement the TV ratings system, such as by creating time of day restrictions and measures that facilitate a consumer's use of the television ratings system." The legislation pending in Congress also involves a "safe harbor" provision and the Senate has adopted language to that effect.

21. A starting point for considering a "safe harbor" solution is our indecency rules. Indecent speech is entitled to constitutional protection, and so cannot be prohibited entirely. However, to protect children, the Commission's rules prohibit the broadcast of indecent speech from 6 a.m. to 10 p.m., when children are likely to be a substantial part of the viewing audience. The Commission may fine television and radio stations for broadcasting indecent content during this time period. At other times of the day, during the "safe harbor" of the late night and early morning hours, the Commission permits the broadcast of such speech. Obscene speech on cable and other subscription television services, as well as on broadcast services, is a criminal offense at all hours. Indecency regulation is only applied to broadcast services. Would it be in the public interest to have "safe harbor" restrictions on violent programming content? Should it apply to the broadcast medium only?

22. Alternatively, the Congress or the Commission could tie the application of any "safe harbor" to the television ratings system, as the bill pending before the Senate Commerce Committee does. That bill would declare it "unlawful for any person to distribute to the public any violent video programming not blockable by electronic means specifically on the basis of its violent content when children are reasonably likely to comprise a substantial portion of the audience." The Senate bill would also require the Commission, upon finding in ongoing review that the television ratings system and the V-chip were not accomplishing their intended purposes, to "prohibit the distribution of violent video programming during the hours when children are reasonably likely to comprise a substantial portion of the audience." In other words, the bill would restrict violent programming to a "safe harbor" only if the programming has not been rated violent, or if the Commission finds that the ratings system and V-chip are not accomplishing their intended purpose. The bill does not distinguish between broadcast and non-broadcast media, and specifically notes that "[b]roadcast television, cable television, and video programming are (A) uniquely pervasive presences in the lives of all American children; and (B) readily accessible to all American children." We seek comment on whether the V–Chip is accomplishing its intended purpose, and if not, whether the safe harbor approach represents the least restrictive means to protect children.

F. Statutory and Constitutional Issues

23. We seek to explore here the bounds of permissible action, both regulatory and statutory, in light of the relevant statutory and constitutional constraints. In their recent letter, members of the House Commerce Committee have asked whether the Commission currently has the authority to adopt a "safe harbor" for the broadcast of violent programming, "or whether Congress would need to provide the Commission with statutory authority to do so, and whether Congress could provide the FCC with that authority in a constitutional fashion." Members of the House Commerce Committee have also asked about constitutional limitations on our ability to define the phrase "excessively violent programming that is harmful to children," or to create a "safe harbor" for such programming. If such a mechanism were adopted, should there be an exception for news or other types of unrated programs? Should there be an exception for cultural, historical, or artistic merit?

24. The Communications Act gives the Commission broad authority to regulate the broadcast medium as the public interest requires. In order to grant a radio license, Title III of the Act requires the Commission to determine "whether the public interest, convenience, and necessity will be served by the granting of such

application," and to issue a license only upon making an affirmative finding. Title III likewise directs the Commission, "as the public interest, convenience, and necessity requires," to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * *" However, Section 326 in Title III also states: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." Is the Commission's general public interest authority sufficiently broad to regulate any form of violent programming, in light of Section 326? Does the DC Circuit's recent decision in *Motion Picture Association of America* v. *FCC* ("MPAA") suggest that the Commission's public interest authority does not extend to regulation of violent program content?

25. The statutory prohibition against "obscene, indecent, or profane language," upon which our ban on obscene speech and safe harbor for indecent and profane speech are based, does not implicate Section 326. Given the interest of members of the House Commerce Committee in creating a "safe harbor," and its question whether we currently have the authority to adopt such a mechanism to regulate violence, could the Commission expand its definition of indecency to include violent programming? The Commission has traditionally defined indecency in terms of sexual or excretory organs and activities, but the Supreme Court has concluded that the term indecent "merely refers to nonconformance with accepted standards of morality" and that "neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language." Certain commentators go even further and argue that violent programming qualifies as obscene speech, which is not entitled to any First Amendment protection. In this regard, we note an opinion of the U.S. Court of Appeals for the Seventh Circuit declining to conflate obscenity and violence in the context of a particular ordinance regulating violent video games, yet suggesting that a demonstrated link between exposure to such games and deleterious effects could possibly provide a basis for regulation of violent "pictures." We recognize that an interpretation of indecency or obscenity as encompassing violence would be novel, but we seek to determine the scope of existing standards to regulate violent programming, as members of the House Commerce Committee request.

26. How does Title V of the 1996 Act, entitled "Obscenity and Violence," affect the Commission's general authority in this area? Section 551 directed the Commission to prescribe "guidelines and recommended procedures for the identification and rating of video programming that contains sexual, *violent, or other indecent material* about which parents should be informed before it is displayed to children," if the television industry itself did not establish "voluntary rules" for rating such programming that were "acceptable to the Commission." Does the reference to "violent or other indecent material" indicate that indecency encompasses violence, or otherwise suggest that Congress intended to empower the agency to regulate violent programming? Was the Commission's authority under this provision at an end once it found the industry guidelines acceptable? In other words, does the statutory scheme suggest that Congress has occupied the field of media violence, such that the Commission cannot act without new legislation?

27. What is the extent of the Commission's current authority over cable television in this area? Title VI of the Act states that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as provided in this title." As indicated above, transmission of obscene and other speech is "unprotected by the Constitution of the United States" and is a criminal offense. Title VI also states that, "[i]n order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit the viewing of a particular cable service during periods selected by that subscriber." Title VI further states that "[u]pon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." The Supreme Court has found this latter provision could be a less restrictive means than a "safe harbor" or "time channeling" requirement to protect children from sexually explicit programming. We seek comment on whether the Commission has authority to regulate violent programming on cable television other than as specifically provided in Title VI. Does the Commission have broader statutory authority to regulate violent programming on DBS and other non-broadcast subscription services, which are not covered by Section 544(f), than on cable services?

28. Assuming the Commission has or is granted statutory authority to regulate violent programming, what constitutional limitations apply? For example, given the definitional issues discussed above, how could Congress or the Commission define some form of violent programming in a way that is not unconstitutionally vague or overbroad? In addition, what standard of constitutional review should apply to broadcast regulation in this area? To non-broadcast? Even if protecting children from some form of violent programming is deemed a sufficiently important government interest, is a "safe harbor" the appropriate and most tailored means to accomplish that public policy? Given the mechanisms available to cable subscribers to block programming under Title VI, could a "safe harbor" constitutionally be applied to cable services? We seek comment on how Congress might legislate and the Commission might regulate in this area, consistent with applicable constitutional principles.

III. Positive Impact of Certain Television Programming

29. We recognize that television programming may have a positive influence on individual behavior, especially educational and informational material directed at children. The literature suggests that consumption of educational television programming correlates positively to children's school preparedness and may also encourage beneficial social skills and behavioral development. Are there recent studies analyzing the pro-social effects of television programming that we should be aware of? What broadcast or non-broadcast services carry such material? How are parents made aware that such programming is available? We seek comment on what actions Congress or the Commission may take to encourage more programming choices that have a positive effect on children's development.

IV. Administrative Matters

30. *Ex Parte Rules.* Pursuant to section 1.1204(b)(1) of the Commission's

rules, 47 CFR 1.1204(b)(1), this is an exempt proceeding. *Ex parte* presentations are permitted, and need not be disclosed.

31. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties must file comments on or before September 15, 2004, and reply comments on or before October 15, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Accessible formats (computer diskettes, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418–7426, TTY (202) 418–7365, or at *brian.millin@fcc.gov*.

32. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html*. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

33. Parties who choose to file by paper must file and original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Best Copy and Printing, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at Suite CY–B402, 445 12th Street, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail, should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

34. *Additional Information.* For additional information on this proceeding, contact Ben Golant at 418–7111.

V. Ordering Clause

35. Accordingly, *it is ordered that*, pursuant to the authority contained in sections 4(i), 303(g), 303(r), and 403 of the Communications Act, 47 U.S.C. 154(i), 303, and 403, this Notice of Inquiry is adopted.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 04–18467 Filed 8–11–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act; Meeting

DATE AND TIME: Tuesday, August 17, 2004 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, August 19, 2004 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Advisory Opinion 2004–19:
DollarVote by Andrew W. Mitchell, President.

Advisory Opinion 2004–26:
Representative Gerald C. Weller and Ms. Zury Rios Sosa by counsel, Jan Witold Baran.

Final Rules on Political Committee Status.

Notice of Availability for a Petition for Rulemaking filed by Robert F. Bauer.

Routine Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Mr. Robert Biersack, Acting Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 04–18517 Filed 8–10–04; 10:43 am]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 7, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309–4470:

1. YBHC Corp., Ponchatoula, Louisiana; to become a bank holding company by acquiring 100 percent of the voting shares of Your Bank, Ponchatoula, Louisiana.

Board of Governors of the Federal Reserve System, August 6, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–18410 Filed 8–11–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Interest Rate on Overdue Debts

Section 30.13 of the Department of Health and Human Services' claims collection regulations (45 CFR part 30) provides that the Secretary shall charge an annual rate of interest as fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date that HHS becomes entitled to recovery. The rate generally cannot be lower than the Department of Treasury's current value of funds rate or the applicable rate determined from the "Schedule of Certified Interest Rates with Range of Maturities." This rate may be revised quarterly by the Secretary of the Treasury and shall be published quarterly by the Department of Health and Human Services in the **Federal Register**.

The Secretary of the Treasury has certified a rate of 11¾% for the quarter ended June 30, 2004. This interest rate will remain in effect until such time as the Secretary of the Treasury notifies HHS of any change.

Dated: August 4, 2004.

Shirl Ruffin,

Acting Deputy Assistant Secretary, Finance.

[FR Doc. 04–18364 Filed 8–11–04; 8:45 am]

BILLING CODE 4150–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–04–0274]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 498–1210 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

CDC Model Performance Evaluation Program (MPEP) for Retroviral and AIDS-Related Testing, OMB No. 0920–0274—Revision—Public Health Practice Program Office (PHPPO), Centers for Disease Control and Prevention (CDC).

In 1986, the Centers for Disease Control and Prevention (CDC) implemented the Model Performance Evaluation Program (MPEP) to evaluate the performance of laboratories conducting testing to detect human immunodeficiency virus type 1 (HIV–1) antibody (Ab), and to support CDC's mission of improving public health and preventing disease through continuously improving laboratory practices.

High-quality HIV–1 antibody testing is essential to meeting the public health objectives for the prevention and control of this retrovirus infection. High-quality CD4+ T-cell determinations and HIV–1 viral RNA (viral load) determinations are essential to HIV-infected patient care and management, and the mission of reducing retrovirus-associated morbidity and mortality. Prevention programs, diagnostic clinics, and seroprevalence studies rely not only on accurate antibody testing results to document HIV infection but also accurate CD4+ T-cell determinations and HIV–1 viral RNA determinations. The impetus for developing this program came from the recognized need to assess the quality of retroviral and AIDS-related laboratory testing and to ensure that the quality of testing was adequate to meet medical and public health needs. The objectives of the MPEP are to: (1) Develop appropriate methods for evaluating quality in laboratory testing systems (including test selection, sample collection, and reporting and interpreting test results); (2) develop strategies for identifying and correcting testing quality failures; and (3) evaluate the effect of testing quality on public health.

This external quality assessment program will be made available at *no cost* (for receipt of sample panels) to sites conducting testing to detect human immunodeficiency virus type 1 (HIV–1) antibody (Ab), CD4+ T-cell determinations, and HIV–1 viral RNA determinations. This program will offer laboratories/testing sites an opportunity for:

- Assuring accurate tests are being provided by the laboratory/testing site through external quality assessment;
- Improving testing quality through self-evaluation in a non-regulatory environment;
- Testing well-characterized samples from a source outside the test kit manufacturer;
- Discovering potential testing problems so that procedures can be adjusted to eliminate them;
- Comparison of testing results with others at a national and international level; and
- Ability to consult with CDC staff to discuss testing issues.

The burden is estimated to be approximately 1057 hours.

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs.)
Enrollments (new)	100	1	3/60
HIV Testing Survey	1,000	1	*1
CD4+ T-cell determinations Survey	325	1	*30/60
HIV–1 Ab PE Results Form	900	2	10/60
HIV–1 RNA PE Results Form	210	2	10/60
CD4+ T-cell determinations PE Results Form	300	2	10/60

*Both the HIV and the CD4+ T-cell determinations surveys are performed every other year; therefore, the total hour burden for these two surveys are divided by two.

Dated: August 5, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–18437 Filed 8–11–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 05005]

Use of Electronic Data To Improve Antimicrobial Use; Notice of Intent To Fund Single Eligibility Award

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the intent to fund fiscal year (FY) 2005 funds for a cooperative agreement program to evaluate the use of electronically-initiated interventions associated to educational interventions to improve antimicrobial use in hospitals. The Catalog of Federal Domestic Assistance number for this program is 93.283.

B. Eligible Applicant

Assistance will be provided only to the Cook County Bureau of Health Services, Hekoteon Institute. For the past five years (12/98 thru 11/2004), the Cook County Bureau of Health Services has been awarded funds under Program Announcement 98039 entitled "Programs to Prevent the Emergence and Spread of Antimicrobial Resistance: Chicago Antimicrobial Resistance Project (CARP)." The CARP project has an existing computer-based surveillance system with the ability to merge patient-level pharmacy and lab (micro, renal function, etc.) data; an algorithm developed and tested to detect patient receiving potentially redundant antimicrobial therapy; the ability to electronically assess antibiotic use and antibiotic starts from date warehouse and data on redundant antimicrobial use. CARP also has data on about 1189 inpatients: 192 received potentially redundant antibiotics; in 71 percent, the use of redundant antibiotics was inappropriate. Following identification of inappropriate use, 98 percent of episodes were corrected by a clinical pharmacist. Further evaluation is critical to assess educational interventions that could be generalized to several healthcare facilities where a pharmacist is not available.

C. Funding

Approximately $250,000 is available in FY 2005 to fund this award. It is expected that the award will begin on or before December, 2004, and will be made for an 18-month budget period within a project period of up to 18-months. Funding estimates may change.

D. Where To Obtain Additional Information

For general comments or questions about this announcement, contact: Technical Information Management, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341–4146, telephone: 770–488–2700.

For technical questions about this program, contact: Denise Cardo, M.D., Project Officer, Centers for Disease Control and Prevention,National Center for Infectious Diseases,1600 Clifton Road, NE.,Mailstop A–07,Atlanta, GA 30333, telephone: 404–498–1160, e-mail: *DCardo@cdc.gov*.

Dated: August 6, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–18436 Filed 8–11–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0229]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Guidance for Industry on Continuous Marketing Applications; Pilot 2—Scientific Feedback and Interactions During Development of Fast Track Products Under the Prescription Drug User Fee Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Guidance for Industry: Continuous Marketing Applications; Pilot 2—Scientific Feedback and Interactions During Development of Fast Track Products Under PDUFA" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of February 26, 2004 (69 FR 8978), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0518. The approval expires on June 30, 2007. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: August 5, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–18408 Filed 8–11–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Recruitment of Sites for Assignment of Corps Personnel

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: General notice.

SUMMARY: The Health Resources and Services Administration (HRSA) announces that the listing of entities, and their Health Professional Shortage Area (HPSA) scores, that will receive priority for the assignment of National Health Service Corps (NHSC) personnel (Corps Personnel) for the period July 1, 2004 through June 30, 2005 is posted on the NHSC Web site at *http://nhsc.bhpr.hrsa.gov/resources/fedreg-hpol/*. This list specifies which entities are eligible to receive assignment of Corps members who are participating in the NHSC Scholarship Program; the NHSC Loan Repayment Program; and Corps members who have become Corps members other than pursuant to contractual obligations under the Scholarship or Loan Repayment Programs. Please note that not all vacancies associated with sites on this list will be for Corps members, but could be for individuals serving an obligation to the NHSC through the Private Practice Option.

Eligible HPSAs and Entities

To be eligible to receive assignment of Corps personnel, entities must: (1) Have a current HPSA designation by the Shortage Designation Branch in the National Center for Health Workforce Analysis, Bureau of Health Professions, Health Resources and Services Administration; (2) enter into an agreement with the State agency that administers Medicaid, accept payment under Medicare and the State Children's Health Insurance Program, see all patients regardless of their ability to pay, and use and post a discounted fee plan; and (3) be determined by the Secretary to have (a) a need and demand for health manpower in the area; (b) appropriately and efficiently used Corps members assigned to the entity; (c) general community support for the assignment of Corps members; (d) made unsuccessful efforts to recruit; and (e) a reasonable prospect for sound fiscal management by the entity with respect to Corps members assigned there. Priority in approving applications for assignment of Corps members goes to sites that (1) provide primary, mental, or oral health services to a HPSA of greatest shortage; (2) are part of a system of care that provides a continuum of services, including comprehensive primary health care and appropriate referrals or arrangements for secondary and tertiary care; (3) have a documented record of sound fiscal management; and (4) will experience a negative impact on its capacity to provide primary health services if a Corps member is not assigned to the entity.

Entities that receive assignment of Corps personnel must assure that (1) the position will permit the full scope of practice and that the clinician meets the credentialing requirements of the State and site; and (2) the Corps member assigned to the entity is engaged in full-time clinical practice for a minimum of 40 hours per week with at least 32 hours per week in the ambulatory care setting. Obstetricians/gynecologists, certified nurse midwives (CNMs), and family practitioners who practice obstetrics on a regular basis, are required to engage in a minimum of 21 hours per week of outpatient clinical practice. The remaining hours, making up the 40-hour per week total, include delivery and other clinical hospital-based duties. Time spent on-call does not count toward the 40 hours per week. In addition, sites receiving assignment of Corps personnel are expected to (1) report to the NHSC all absences in excess of the authorized number of days (up to 35 work days or 280 hours); (2) report to the NHSC any change in the status of an NHSC clinician at the site; (3) provide the time and leave records, schedules, and any related personnel documents for NHSC assignees (including documentation, if applicable, of the reason(s) for the termination of an NHSC clinician's employment at the site prior to his or her obligated service end date); and (4) submit a Uniform Data System (UDS) report. This system allows the site to assess the age, sex, race/ethnicity of, and provider encounter records for, its user population. The UDS reports are site specific. Providers fulfilling NHSC commitments are assigned to a specific site or, in some cases, more than one site. The scope of activity to be reported in UDS includes all activity at the site(s) to which the Corps member is assigned.

Evaluation and Selection Process

In approving applications for the assignment of Corps members, the Secretary shall give priority to any such application that is made regarding the provision of primary health services to a HPSA with the greatest such shortage. For the program year July 1, 2004–June 30, 2005, HPSAs of greatest shortage for determination of priority for assignment of Corps personnel will be defined as follows: (1) Primary care HPSAs with scores of 14 and above are authorized for the assignment of Corps members who are primary care physicians participating in the Scholarship Program; (2) primary care HPSAs with scores of 13 and above are authorized for the assignment of Corps members who are family nurse practitioners (NPs) and physician assistants (PAs) participating in the Scholarship Program; (3) primary care HPSAs with scores of 8 and above are authorized for the assignment of Corps members who are CNMs participating in the Scholarship Program; (4) mental health HPSAs with scores of 20 and above are authorized for the assignment of Corps members who are physician psychiatrists participating in the Scholarship Program; (5) dental HPSAs with scores of 20 and above are authorized for the assignment of Corps members who are dentists participating in the Scholarship Program; and (6) HPSAs (appropriate to each discipline) with scores of 14 and above are authorized for the assignment of Corps members who are participating in the Loan Repayment Program. HPSAs with scores below 14 will be eligible to receive assignment of Corps personnel participating in the Loan Repayment Program only after assignments are made of those Corps members matching to those HPSAs receiving priority for placement of Corps members through the Loan Repayment Program (*i.e.*, HPSAs scoring 14 or above). Placements made through the Loan Repayment Program in HPSAs with scores 13 or below will be made by decreasing HPSA score, and only to the extent that funding remains available. All sites on the list are eligible sites for individuals wishing to serve in an underserved area but who are not contractually obligated under the Scholarship or Loan Repayment Program. A listing of HPSAs and their scores is posted at *http://belize.hrsa.gov/newhpsa/newhpsa.cfm.*

Sites qualifying for an automatic primary care HPSA designation have been scored and may be authorized to receive assignment of Corps members if they meet the criteria outlined above and their automatic primary care HPSAs assigned scores are above the stated cutoffs. Sites qualifying for an automatic mental health or dental HPSA designation are currently unscored. A methodology to score these automatic HPSAs is currently being developed. Sites on the list with an unscored HPSA designation are authorized for the assignment of Corps personnel participating in the Loan Repayment Program only, after assignments are made of those Corps members matching to scored HPSAs and only to the extent that funding remains available. When automatic HPSAs receive scores, these sites will then be authorized to receive assignment of Corps members if they meet the criteria outlined above and their newly assigned scores are above the stated cutoffs.

The number of new NHSC placements through the Scholarship and Loan Repayment programs allowed at any one site are limited to the following:

(1) Primary Health Care.

(a) Loan Repayment Program—no more than 2 physicians (MD or DO); and no more than a combined total of 2 NPs, PAs, or CNMs.

(b) Scholarship Program—no more than 2 physicians (MD or DO); and no more than a combined total of 2 NPs, PAs, or CNMs.

(2) Dental.

(a) Loan Repayment Program—no more than 2 dentists and 2 dental hygienists.

(b) Scholarship Program—no more than 1 dentist.

(3) Mental Health.

(a) Loan Repayment Program—no more than 2 psychiatrists (MD or DO); and no more than a combined total of 2 clinical or counseling psychologists; licensed clinical social workers, licensed professional counselors, marriage and family therapists, or psychiatric nurse specialists.

(b) Scholarship Program—no more than 1 psychiatrist.

Application Requests, Dates and Address

The list of HPSAs and entities that are eligible to receive priority for the placement of Corps personnel may be updated periodically. Entities that no longer meet eligibility criteria, including HPSA score, will be removed from the priority listing. Entities interested in being added to the high priority list must submit an NHSC Recruitment and Retention Assistance Application to: National Health Service Corps, 5600 Fishers Lane, Room 8A–55, Rockville, MD 20857, fax (301) 594–2721. These applications must be submitted on or before the deadline date of March 25, 2005. Applications submitted after this deadline date will be considered for placement on the priority placement list in the following program year. Any changes to this deadline will be posted on the NHSC Web site at *http://nhsc.bhpr.hrsa.gov.*

Entities interested in receiving application materials may do so by calling the NHSC call center at 1–800–221–9393. They may also get information and download application materials from: *http://nhsc.bhpr.hrsa.gov/applications/rraa.cfm.*

Additional Information

Entities wishing to provide additional data and information in support of their inclusion on the proposed list of HPSAs and entities that would receive priority in assignment of Corps members, must do so in writing no later than September 13, 2004. This information should be submitted to the National Health Service Corps, 5600 Fishers Lane, Room 8A–55, Rockville, MD 20857. This information will be considered in preparing the final list of HPSAs and entities that are receiving priority for the assignment of Corps personnel.

Paperwork Reduction Act

The Recruitment & Retention Assistance Application has been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915–0230.

The program is not subject to the provision of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100).

Dated: August 4, 2004.

Elizabeth M. Duke,

Administrator.

[FR Doc. 04–18409 Filed 8–11–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

Program Exclusions: July 2004

AGENCY: Office of Inspector General, HHS.

ACTION: Notice of program exclusions.

During the month of July 2004, the HHS Office of Inspector General imposed exclusions in the cases set forth below. When an exclusion is imposed, no program payment is made to anyone for any items or services(other than an emergency item or service not provided in a hospital emergency room) furnished, ordered or prescribed by an excluded party under the Medicare, Medicaid, and all Federal Health Care programs. In addition, no program payment is made to any business or facility, *e.g.*, a hospital, that submits bills for payment for items or services provided by an excluded party. Program beneficiaries remain free to decide for themselves whether they will continue to use the services of an excluded party even though no program payments will be made for items and services provided by that excluded party. The exclusions have national effect and also apply to all Executive Branch procurement and non-procurement programs and activities.

Subject name	Address	Effective date
Program-Related Convictions		
Agyemang, Kwadwo	Union, NJ	8/19/2004
Albanese, Gabriella	Albion, NY	8/19/2004
Artsrounian, Haik	Taft, CA	8/19/2004
Bardo, Manuel	Miami, FL	8/19/2004
Bejanzadeh, Emil	North Las Vegas, NV	8/19/2004
Bielaus, Michael	Kenner, LA	8/19/2004
Breslow, Julian	Boca Raton, FL	2/10/2004
Butcher, Holly	The Colony, TX	8/20/2002
Callejas, Juana	Adelanto, CA	8/19/2004
Canon, Robert	Shelbyville, TN	8/19/2004
Carroll, Lynda	Ellensburg, WA	8/19/2004
Castaneto, Orlando	Carson, CA	8/19/2004
Ciraolo, Costanza	Rancho Palose Verdes, CA	8/19/2004
Ciraolo, Juan	Taft, CA	8/19/2004
Cloyd, Tonya	Milwaukee, WI	8/19/2004
Cogdell, Myra	Wyandanch, NY	8/19/2004
Collado-Marcial, Jose	Toa Baja, PR	8/19/2004
Courtney, Rachel	Coshocton, OH	8/19/2004
Darr, Adele	Taylor, AZ	5/22/2004
Darr, James	Phoenix, AZ	5/22/2004
Foster, Travis	Atlanta, GA	8/19/2004
Gallego, Robert	Marina, CA	8/19/2004
Gonzalez, Luisa	Adelanto, CA	8/19/2004
Helterbran, Cheryl	Columbus, OH	8/19/2004
Hudkins, James	Shelton, WA	8/19/2004
Hyman, Parnell	Yankton, SD	8/19/2004
Johnson, Nathan	Texarkana, TX	8/19/2004
Jones, Teresa	Milwaukee, WI	8/19/2004
Joyce, James	Goldsboro, NC	8/19/2004
Khachatrian, Sarkis	Lompoc, CA	8/19/2004
Lawrence, Gwendolyn	Cleveland, OH	8/19/2004

Subject name	Address	Effective date
Loberg, Kellie	Jacobson, MN	8/19/2004
Lodge, Craig	Duluth, GA	8/19/2004
Martin, Bennie	Paterson, NJ	8/19/2004
Martin, Valeria	Milwaukee, WI	8/19/2004
McKenzie, Eunice	Mt Vernon, NY	8/19/2004
Meirink, Lillian	Topeka, KS	8/19/2004
Misorski, John	Beaver, PA	8/19/2004
Monroe-Gonroff, Tami	Oregon City, OR	8/19/2004
Morse, Teresita	Edmonds, WA	8/19/2004
Murphy, Charles	Clinton, NC	8/19/2004
Parker, Kenneth	Ellenwood, GA	8/19/2004
Pena, Irma	Los Angeles, CA	8/19/2004
Reiss, Moshe	Brooklyn, NY	8/19/2004
Renick, John	Panama City, FL	8/20/2002
Ridgeley, Deborah	Phoenix, AZ	8/19/2004
Ridgeley, Richard	Taft, CA	8/19/2004
Rowland, Tara	East Columbus, OH	8/19/2004
Ruffin, Shalonte	Scotland Neck, NC	8/19/2004
Shams, Imran	Huntington Beach, CA	8/19/2004
Stewart, Allan	Elk, WA	8/19/2004
Tecson, Ronaldo	Eloy, AZ	8/19/2004
Varda, Ann	Chisholm, MN	8/19/2004
Warwick, Julius	Coolidge, AZ	8/19/2004
Watson, Bernettá	Idaho Falls, ID	8/19/2004
Wegner, Kathleen	Billings, MT	8/19/2004
White, Timothy	New York, NY	8/19/2004
Williams, Donald	Jonesboro, GA	8/19/2004
Woodward, David	Loretta, PA	8/19/2004
Felony Conviction for Health Care Fraud		
Acosta, Erma	Sebring, FL	8/19/2004
Barclay, Aaronette	Maplewood, MN	8/19/2004
Becker, Tina	Sidney, OH	8/19/2004
Besel, Cheryl	Wichita, KS	8/19/2004
Chavez, Genesis	Campbell, CA	8/19/2004
Coss-Rea, Christine	Painesville, OH	8/19/2004
Fennell, Dennis	Georgetown, TX	8/19/2004
Fields, Dana	Clearwater, FL	8/19/2004
Finder, Richard	Watermill, NY	8/19/2004
Garish, Corena	Dayton, OH	8/19/2004
Greenbaum, Irwin	Greenville, MI	8/19/2004
Johnson, Vernon	Achille, OK	8/19/2004
Laboe, Bradley	Onsted, MI	8/19/2004
LeQuatte, Ernest	Herrin, IL	8/19/2004
Parmenter, Betty	Grants Pass, OR	8/19/2004
Redding, James	Minersville, PA	8/19/2004
Ruiz, Denise	Port St Lucie, FL	8/19/2004
Sherman, Josef	Eglin AFB, FL	8/19/2004
Sherman, Yevgeny	Coleman, FL	8/19/2004
Felony Control Substance Conviction		
Anderson, Stephanie	Bloomington, IN	8/19/2004
Anthony, Joseph	Raiford, FL	8/19/2004
Buchman, Jacquelyn	Westlake, OH	8/19/2004
Burdine, Elizabeth	Wakeman, OH	8/19/2004
Cohen, Abbott	Alpena, MI	8/19/2004
Cooper, Frank	Houston, TX	8/19/2004
Cummings, Angelique	N Richland Hills, TX	8/19/2004
Gates, Thomas	West Branch, MI	8/19/2004
Goodin, Richard	Ogdensburg, NY	8/19/2004
Ollison, Tommy	Gonzales, TX	8/19/2004
Salem, Salem	St Thomas, VI	8/19/2004
Salem-Zuhdi, Rushdi	Eglin AFB, FL	8/19/2004
Santos, Rodolfo	Lexington, KY	8/19/2004
Sawaf, Ali	Glenville, WV	8/19/2004
Thibodeau, Anne	Biddeford, ME	8/19/2004
Yabut-Baluyut, Fredesminda	Dublin, CA	8/19/2004
Patient Abuse/Neglect Convictions		
Ahmed, Azzam	London, OH	8/19/2004

Subject name	Address	Effective date
Beeman, Lawrence	Greeley, CO	8/19/2004
Beran, Nancy	Bouckville, NY	8/19/2004
Borela, Lincoln	Belle Plaine, MN	8/19/2004
Brown, Caryn	Benton Harbor, MI	8/19/2004
Day, Arlene	Bronx, NY	8/19/2004
Duval, Wilna	Westbury, NY	8/19/2004
Fehr, Myra-Becca	Wilsonville, OR	8/19/2004
Green, Mark	Akron, OH	8/19/2004
Hayes, Robert	Toledo, OH	8/19/2004
Hayes, Timothy	Wayne, PA	8/19/2004
Headley, Peggy	Williamsburg, OH	8/19/2004
Heavenly Care Remember Me, Inc	Milwaukee, WI	8/19/2004
Herring, Lionel	Washington, DC	8/19/2004
Jenkins, Michelle	Oswego, NY	8/19/2004
Lafon, Michael	Haddonfield, NJ	8/19/2004
Leisure Living Management of Lansing, Inc	Lowell, MI	8/19/2004
Levingston, Lashun	Milwaukee, WI	8/19/2004
McCrimmon, Samantha	McRae, GA	8/19/2004
Montgomery, Muriel	Delhi, LA	8/19/2004
Murphy, Ruth	Ludow, KY	8/19/2004
Patchett, Brenda	McMinnville, OR	8/19/2004
Robbins, Tracey	Buffalo, NY	8/19/2004
Robinzine, Shuntay	Enid, MS	8/19/2004
Rowland, Kevin	Platte City, MO	8/19/2004
Tacras, Joel	Waipahu, HI	8/19/2004
Veales, Tamara	Pauls Valley, OK	8/19/2004
Walton, Michael	Airway Heights, WA	8/19/2004
Washington, Cassandra	Bunkie, LA	8/19/2004
Williams, Joyce	Rochester, NY	8/19/2004
Williams, Thomas	Towson, MD	8/19/2004
Woodall, Clarence	Jackson, MS	8/19/2004
Conviction for Health Care Fraud		
Turner, Lynda	Baton Rouge, LA	8/19/2004
License Revocation/Suspension/Surrendered		
Adams, William	Acton, CA	8/19/2004
Akers, Cynthia	Kokomo, IN	8/19/2004
Amanatullah, Frank	Pocatello, ID	8/19/2004
Amontos, Bonifacio	Carson, CA	8/19/2004
Amsden, Ann	Colusa, CA	8/19/2004
Anderson, Lynette	Mead, WA	8/19/2004
Anderson, Tommie	Columbia, MS	8/19/2004
Armstrong, Elizabeth	Lancaster, OH	8/19/2004
Astarita, Margaret	Georgetown, TX	8/19/2004
Aviles, Veronica	Santa Ana, CA	8/19/2004
Bangkok Health Club	Tampa, FL	8/19/2004
Barnett, Clarence	Laurel, MS	8/19/2004
Bays, Barbara	Barbourville, KY	8/19/2004
Beccue, Diana	Altamont, IL	8/19/2004
Bennett, Betty	Echola, AL	8/19/2004
Bettini, Janice	Andover, MA	8/19/2004
Bohlen, Myra	Awendaw, SC	8/19/2004
Bunting, Melanie	Indianapolis, IN	8/19/2004
Carl, Cynthia	Goodyear, AZ	8/19/2004
Cerny, Jerome	Terre Haute, IN	8/19/2004
Chung, Kapeun	Farmington, MO	8/19/2004
Connolly, Joyce	Chelmsford, MA	8/19/2004
Cooper, Patricia	Aledo, IL	8/19/2004
Cortez, Federico	El Monte, CA	8/19/2004
Cowlin, Christine	Pittsfield, MA	8/19/2004
Coy, Frederick	Tucson, AZ	8/19/2004
Crenshaw, Sherrie	Nice, CA	8/19/2004
Crystal's Beauty Salon, Inc	Miami, FL	8/19/2004
Cusack, Deborah	Poulsbo, WA	8/19/2004
Devi, Mani Manjari	Brooklyn, NY	8/19/2004
Dicke, John	Morrison, CO	8/19/2004
Dieterle, Karen	Sickerville, NJ	8/19/2004
Dietz, Kim	Rapid City, SD	8/19/2004
Dinsmore, Karen	Wilsonville, OR	8/19/2004
Donnelly, Paula	Harvest, AL	8/19/2004

Subject name	Address	Effective date
Dooley, Linda	N Quincy, MA	8/19/2004
Florence, Tina	Warrior, AL	8/19/2004
Francis, Elizabeth	Phoenix, AZ	8/19/2004
Franklin, Lawanda	Mobile, AL	8/19/2004
Freed, Sheryl	Rock Island, IL	8/19/2004
Gonzoph, Barbara	Collingswood, PA	8/19/2004
Goulbourne, Apryl	Huntsville, AL	8/19/2004
Green, Charleen	Fredrick, OK	8/19/2004
Haines, Ramona	Marlton, NJ	8/19/2004
Haley, Dellashawn	Long Beach, CA	8/19/2004
Hannam, Kelly	Wasilla, AK	8/19/2004
Harris, Linda	Desert Hot Springs, CA	8/19/2004
Herrington, Kelli	Tulsa, OK	8/19/2004
Hill, Cheryl	Waterloo, IA	8/19/2004
Hixson, Karin	Pompano Beach, FL	8/19/2004
Hobbs, Tina	Bakersfield, CA	8/19/2004
Hoffman, Jerri	Lawton, OK	8/19/2004
Hooks, James	Northglenn, CO	8/19/2004
Hurt, Winifred	Lockport, IL	8/19/2004
Hutchings, Tyson	Cameron Park, CA	8/19/2004
Jackson, Cindy	Gadsden, AL	8/19/2004
Jarrett, Betty	Sierra Vista, AZ	8/19/2004
Jobe, Judy	Boise, ID	8/19/2004
Johnson, Frank	St Paul, MN	8/19/2004
Kelly, Cory	Birmingham, AL	8/19/2004
King, John	West Memphis, AR	8/19/2004
Krist, Gary	Auburn, GA	8/19/2004
Lawson, Janis	Cincinnati, OH	8/19/2004
Levy, Stephen	Wilton, CT	8/19/2004
Lipsey, Joyce	Plantersville, MS	8/19/2004
Lorenzo, Roberto	Rosemead, CA	8/16/2004
Lucchetti, Frank	Napa, CA	8/19/2004
Lynn, Laura	Bessemer, AL	8/19/2004
Martin, Sandra	Birmingham, AL	8/19/2004
Martinez, Priscilla	Seattle, WA	8/19/2004
Matticks, Penni	Springfield, IL	8/19/2004
Mawikere, Sandy	Upland, CA	8/19/2004
Mays, Jessica	Haleyville, AL	8/19/2004
McBroom, Melanie	Big Pine Key, FL	8/19/2004
McKenzie, Jennie	Fulton, IL	8/19/2004
McLean-Neufeld, Richard	Mankato, MN	8/19/2004
Mester, Carol	Mineville, NY	8/19/2004
Mick, Cheri	Sun City, AZ	8/19/2004
Miller, Patricia	Edwardsburg, MI	8/19/2004
Miller, Sean	Las Vegas, NV	8/19/2004
Moore, Emery	Fallbrook, CA	8/19/2004
Morgan, Katherine	Silverton, OR	8/19/2004
Nash, Julia	Irvine, CA	8/19/2004
Norris, Heather	Bronx, NY	8/19/2004
Oehmen, Judith	Burbank, CA	8/19/2004
Payne, Angel	Clayton, WA	8/19/2004
Pepper, Joan	Cape May, NJ	8/19/2004
Perry, Josie	Minneapolis, KS	8/19/2004
Pickett, Kim	Salt Lake, UT	8/19/2004
Pitts, Amanda	Bothell, CA	8/19/2004
Pletz, John	San Francisco, CA	8/19/2004
Ponce, Ines	Baldwin Park, CA	8/19/2004
Price, Jeri	Pismo Beach, CA	8/19/2004
Rath, Siddhartha	Shreveport, LA	8/19/2004
Reed, John	Chicago, IL	8/19/2004
Reed, Tracey	Winchester, IL	8/19/2004
Reid, Kathleen	Las Vegas, NV	8/19/2004
Riley, Jason	Indianapolis, IN	8/19/2004
Riley, Johnnie	Kankakee, IL	8/19/2004
Riley, Thad	Milton, FL	8/19/2004
Rodriquez, Sonia	Lewisville, TX	8/19/2004
Rogers-Faneuf, Richelle	Peabody, MA	8/19/2004
Root, Delena	Winooski, VT	8/19/2004
Satterley, Charles	Bellport, NY	8/19/2004
Schutt, Michelle	Leroy, NY	8/19/2004
Shaver, Steven	Las Vegas, NV	7/23/2004
Short, Susan	Kodiak, AK	8/19/2004
Shriver, Sue	Winston-Salem, NC	8/19/2004

Subject name	Address	Effective date
Sigler, Ruth	Danville, IL	8/19/2004
Simonds, Shantri	Claremont, NH	8/19/2004
Sims, Gary	Laurel, MS	8/19/2004
Slief, Mary	Dallas, TX	8/19/2004
Sneed, Andrew	Boulder City, NV	8/19/2004
Stanton, Jacquelyn	Denver, CO	8/19/2004
Stephens, Grant	McMinnville, OR	8/19/2004
Stone, Kokoro	Portland, OR	8/19/2004
Stuart, Christine	North Manchester, IN	8/19/2004
Tiernan, Kevin	Louisville, KY	8/19/2004
Torres, Julian	Santa Ana, CA	8/19/2004
Tyrreli, Mark	Little Falls, NJ	8/19/2004
Urbina, Ibis	Merced, CA	8/19/2004
Vannoy, Angela	North Vernon, IN	8/19/2004
Wadley, Stephanie	Grove, OK	8/19/2004
White, Melody	Saint Augustine, FL	8/19/2004
Yarbrough, Kimberly	Jackson Gap, AL	8/19/2004
Ziegler, Stephanie	Harmony, PA	8/19/2004
Zimmerman, Richard	Grand Rapids, MI	8/19/2004
Zins, Patricia	Boise, ID	8/19/2004
Federal/State Exclusion/Suspension		
Brown, Thomas	Carlinville, IL	8/19/2004
Daley, Rebecca	Pembroke, ME	8/19/2004
Stamboliu, Dan	Chicago, IL	8/19/2004
Yamini, Dorian	Olympia Fields, IL	8/19/2004
Fraud/Kickbacks/Prohibited Acts/Settlement Agreements		
American Home Vision	St Louis, MO	3/15/2004
Goldberg, Steven	Chesterfield, MO	3/15/2004
Owned/Controlled by Convicted Entities		
Acupuncture Chiropractic Medical Clinic	Los Angeles, CA	8/19/2004
Back to Health, Inc	Los Altos, CA	8/19/2004
Better Health Pharmacy, Inc	Brooklyn, NY	8/19/2004
Brooklyn Medical Arts HIV Care, PC	Brooklyn, NY	8/19/2004
John A Giddings, MD, Inc	Duarte, CA	8/19/2004
Keith R Ohanesian, DC	Sherman Oaks, CA	8/19/2004
Kubski & Kubski, MD, PA	West Palm Beach, FL	8/19/2004
MIA Transportation Services, Inc	Euclid, OH	8/19/2004
Michael W Hardee, DMD, MS, PA	Seminole, FL	8/19/2004
Southern California Cardiology	Duarte, CA	8/19/2004
Default on Heal Loan		
Bennett, Chris	Wichita, KS	8/19/2004
Davidek, Rosali	Riverside, CA	8/19/2004
McKay, Kevin	Dallas, TX	8/19/2004
Ofor, Chukwu	Houston, TX	8/19/2004
Schoonover, John	Desoto, TX	8/19/2004
Sinclair, Blake	Tyler, TX	8/19/2004
Swella, Jeffrey	St Petersburg, FL	8/19/2004
Ybanez, Manuel	Lakeland, FL	8/19/2004

Dated: July 4, 2004.

Kathleen Pettit,

Acting Director, Exclusion Staff, Office of Inspector General.

[FR Doc. 04–18411 Filed 8–11–04; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2004–18834]

National Offshore Safety Advisory Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the National Offshore Safety Advisory Committee (NOSAC). NOSAC provides advice and makes recommendations to the Coast Guard on matters affecting the offshore industry.

DATES: Application forms should reach the Coast Guard on or before September 30, 2004.

ADDRESSES: You may request an application form by writing to

Commandant (G–MSO–2), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593–0001; by calling (202) 267–1082; or by faxing (202) 267–4570. A copy of the application form is also available from the Coast Guard's Advisory Committee Web page at: *http://www.uscg.mil/hq/g-m/advisory/index.htm*. Send your application in written form to the above street address. This notice is available on the Internet at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Commander John M. Cushing, Executive Director of NOSAC, or James M. Magill, Assistant to the Executive Director, telephone (202) 267–1082, fax (202) 267–4570.

SUPPLEMENTARY INFORMATION: NOSAC is a Federal advisory committee established under the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 (Pub. L. 92–463, 86 Stat. 770, as amended). It consists of 15 regular members who have particular knowledge and experience regarding offshore technology, equipment, safety and training, as well as environmental expertise in the exploration or recovery of offshore mineral resources. It provides advice and makes recommendations to the Assistant Commandant for Marine Safety, Security and Environmental Protection regarding safety, security and rulemaking matters relating to the offshore mineral and energy industries. This advice assists the Coast Guard in developing policy and regulations and formulating the positions of the United States in advance of meetings of the International Maritime Organization.

NOSAC meets twice a year, with one of these meetings being held at Coast Guard Headquarters in Washington, DC. It may also meet for extraordinary purposes. Its subcommittees and working groups may meet to consider specific problems as required.

We will consider applications for five positions. These positions will begin in January, 2005. Applications should reach us by September 30, 2004, but we will consider applications received later if they arrive within a reasonable time before we make our recommendations to the Secretary of Homeland Security.

To be eligible, applicants should have experience in one of the following categories: (1) Offshore drilling, (2) offshore supply vessel services including geophysical services, (3) safety and training relating to offshore activities, (4) offshore production or (5) national environmental interests. Please state on the application form which of the five categories you are applying for. Each member normally serves a term of 3 years, or until a replacement is appointed. Some members may serve consecutive terms. All members serve at their own expense and receive no salary, reimbursement of travel expenses, or other compensation from the Federal Government.

In support of the policy of the Coast Guard on gender and ethnic diversity, we encourage qualified women and members of minority groups to apply.

Dated: August 5, 2004.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security and Environmental Protection.

[FR Doc. 04–18472 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Aquatic Nuisance Species Task Force Western Panel Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice announces a meeting of the Aquatic Nuisance Species (ANS) Task Force Western Regional Panel. The meeting topics are identified in the **SUPPLEMENTARY INFORMATION.**

DATES: The Western Regional Panel will meet from 8 a.m. to 4 p.m. on Wednesday, September 8, 2004, 8 a.m. to 4 p.m. on Thursday, September 9, 2004, and 8 a.m. to 1:30 p.m. on Friday, September 10, 2004. Minutes of the meeting will be available for public inspection during regular business hours, Monday through Friday.

ADDRESSES: The Western Regional Panel meeting will be held at the Sheraton Anchorage Hotel, 401 East 6th Avenue, Anchorage, AK 99501. Phone 907–276–8700. Minutes of the meeting will be maintained in the office of Chief, Division of Environmental Quality, U.S. Fish and Wildlife Service, Suite 322, 4401 North Fairfax Drive, Arlington, Virginia 22203–1622.

FOR FURTHER INFORMATION CONTACT: Tina Proctor, Western Panel Coordinator and FWS Regional Aquatic Nuisance Species Program Coordinator, U.S. Fish and Wildlife Service, P.O. Box 25486, DFC, Denver CO, 80225, or Everett Wilson, U.S. Fish and Wildlife Service at 703–358–2108.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces meetings of the Aquatic Nuisance Species Task Force Western Regional Panel. The Task Force was established by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. The Western Regional Panel was established by the ANS Task Force in 1997 and is comprised of representatives from Federal, State, and local agencies and from private environmental and commercial interests.

The purpose of the Panel is to advise and make recommendations to the Aquatic Nuisance Species Task Force on issues relating to the Western region of the United States that includes: Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Kansas, Montana, North Dakota, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. Responsibilities of the Panel include:

a. Identifying priorities for the Western Region with respect to aquatic nuisance species;

b. Making recommendations to the Task Force regarding an education, monitoring (including inspection), prevention, and control program to prevent the spread of the zebra mussel west of the 100th Meridian.

c. Coordinating, where possible, other aquatic nuisance species program activities in the Western region that are not conducted pursuant to the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (as amended, 1996);

d. Developing an emergency response strategy for Federal, State, and local entities for stemming new invasions of aquatic nuisance species in the region;

e. Providing advice to public and private individuals and entities concerning methods of controlling aquatic nuisance species; and

f. Submitting an annual report describing activities within the Western region related to aquatic nuisance species prevention, research, and control.

The Western Regional Panel will discuss several topics at this meeting including: ballast water challenges, impact of New Zealand mud snails, member updates, zebra mussels in the Missouri River, zebra mussels in Kansas, assessing the potential ecological and economic impacts of zebra mussels to Western river systems, NAISA status, status of State ANS management plans, reports from other regional panels, the Canadian national strategy to deal with the threat of invasive species, climate change—opening up new routes and pathways, northern pike impacts on native fish, an outreach program to aquarium owners,

and aquatic nuisance species in Alaska. There will also be reports on WRP projects: cross boundary Spartina control and eradication, the educational material catalog on a searchable database, the joint Western Governor's Association project and the database of estuarine species in California, Oregon and Washington.

Dated: July 28, 2004.

Mamie A. Parker,

Co-Chair, Aquatic Nuisance Species Task Force, Assistant Director—Fisheries & Habitat Conservation.

[FR Doc. 04–18458 Filed 8–11–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Request for Public Comments on Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposed information collection described below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information may be obtained by contacting the Bureau's clearance officer at the phone number listed below. OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days; therefore, public comments should be submitted to OMB within 30 days in order to assure their maximum consideration. Address your comments and suggestions on the proposal by fax (202) 395–6566 or e-mail (*oira_docket@omb.eop.gov*) to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Interior Department. Send copies of your comments to the USGS Clearance Officer, U.S. Geological Survey, 807 National Center, 12201 Sunrise Valley Drive, Reston, Virginia 20192, or e-mail (*jcordyac@usgs.gov*).

Specific public comments are requested as to:

1. Whether the collection of information is necessary for the proper performance of the functions on the bureaus, including whether the information will have practical utility;

2. The accuracy of the bureau's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. The quality, utility, and clarity of the information to be collected; and

4. How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Title: Public perceptions of Bats in Fort Collins, Colorado.

OMB Approval No.: New collection.

Abstract: The primary objective of this information collection is to investigate public perceptions, knowledge, and awareness of bats and how this could influence potential transmission of disease (*i.e.*, from bats to bats, bats to pets, bats to humans). A random sample of Fort Collins, Colorado residents and a sample of identified residents known to have had an encounter with a bat will be asked about these bat-related issues via a questionnaire. This information is a vital component for managing bats and developing effective communications protocols regarding bat disease and ecology. This is collaborative effort involving scientists from Colorado State University (CSU), the U.S. Geological Survey (USGS), and Centers for Disease Control and Prevention (CDC).

Bureau Form No.: None.

Frequency: One time.

Description of Respondents: Residents of Fort Collins, Colorado.

Estimated Completion Time: 20 minutes per respondent (approximate).

Number of Respondents: 950.

Burden hours: 317 hours.

For Additional Information Please Contact: Natalie Sexton, (970) 226–9313, or e-mail *Natalie_sexton@usgs.gov.*

Bureau clearance officer: John Cordyack (703) 648–7313.

Dated: June 24, 2004.

Byron K. Williams,

Acting Associate Director Biology.

[FR Doc. 04–18405 Filed 8–11–04; 8:45 am]

BILLING CODE 4310–Y7–M

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day notice of information collection under review: Department Annual Progress Report.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until October 12, 2004. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Rebekah Dorr, Department of Justice, Office of Community Oriented Policing Services, 1100 Vermont Avenue, NW., Washington, DC 20530.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Department Annual Progress Report (DAPR).

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice, Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Law enforcement agencies that are recipients of COPS hiring grants and/or COPS grants that have a redeployment requirement. The

Department Annual Progress Report was part of a business process reengineering effort aimed at minimizing the reporting burden on COPS grantees by streamlining the collection of progress report and COPS Count information into one annual report.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 9,000 respondents annually will complete the form within 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 9,000 total annual burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: August 6, 2004.

Brenda E. Dyer,

Clearance Officer, Department of Justice.

[FR Doc. 04–18425 Filed 8–11–04; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: National Sex Offender Registry.

The Department of Justice (DOJ), Federal Bureau of Investigation, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until October 12, 2004. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Venetia A. King, Criminal Information and Transition Unit, Program Development Section, Criminal Justice Information Services Division, Federal Bureau of Investigation, 1000 Custer Hollow Road, Clarksburg, WV 26306.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* National Sex Offender Registry.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: none. Federal Bureau of Investigation (FBI).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, local, or tribal government. The National Sex Offender Registry data is collection from the 50 States, 5 Territories, and the District of Columbia. The registry was established by the FBI in accordance with Federal Law (42 U.S.C. 14072) in order to track the whereabouts and movements of persons who have been convicted of a criminal offense against a victim who is a minor; persons who have been convicted of a sexually violent offense; and persons who are sexually violent predators.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated number of respondents is 56 government entities. The estimated time for the average respondent to respond: The collection of information from the sex offender is sponsored by the state government. The subsequent electronic transmission into the National Sex Offender Registry poses no additional burden on the state. The telecommunication network used for the transmission of NSOR data is an existing network, and the FBI assumes all costs.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total annual burden hour associated with this collection is 1 to allow OMB approval.

FOR FURTHER INFORMATION CONTACT: Brenda E. Dyer, Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: August 6, 2004.

Brenda E. Dyer,

Clearance Officer, Department of Justice.

[FR Doc. 04–18426 Filed 8–11–04; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

July 28, 2004.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Ira Mills on (202) 693–4122 (this is not a toll-free number) or e-mail: *mills.ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, Office of Management and Budget, Room 10235, Washington, DC 20503 (202) 395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Employment and Training Administration.

Type of Review: Extension of a currently approved collection.

Title: Planning Guidance and Instructions for Submission of the Strategic Five Year State Plan and Plan Modifications for Title I of the Workforce Investment Act of 1998 and the Wagner Payser Act.

OMB Number: 1205–0398.

Frequency: On occasion.

Affected Public: State, local, or tribal government.

Number of Respondents: 59.

Number of Annual Responses: 59.

Estimated Time per Response: 25 hours.

Burden Hours Total: 1475.

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: The Workforce Investment Act of 1998 (Public Law 105–220) provides the framework for a network of State workforce investment systems designed to meet the needs of the nation's businesses, job seekers, youth, and those who want to further their careers. Title I requires that States develop five-year strategic plans for this system, which must also contain the detail plans required under the Wagner-Peyser Act (29 U.S.C. 49g). The Act also requires States to request new Plans (if expiring) and modifications to these Plans as outlined by WIA (20CFR661.230) or the Wagner-Peyser Act (20 CFR 652.212–214).

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–18442 Filed 8–11–04; 8:45 am]

BILLING CODE 4510–30–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–008–ESP; ASLBP No. 04–822–02–ESP]

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site); Notice of Reconstitution

Pursuant to 10 CFR 2.321, the Atomic Safety and Licensing Board in the above captioned proceeding is hereby reconstituted by appointing the following Administrative Judges:

Alex S. Karlin, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. Thomas S. Elleman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. Richard F. Cole, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302.

Issued at Rockville, Maryland this 6th day of August 2004.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 04–18431 Filed 8–11–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–007–ESP; ASLBP No. 04–821–01–ESP]

Exelon Generation Company, LLC, (Early Site Permit for Clinton ESP Site); Notice of Reconstitution

Pursuant to 10 CFR 2.321, the Atomic Safety and Licensing Board in the above captioned proceeding is hereby reconstituted by appointing the following Administrative Judges:

Dr. Paul B. Abramson, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission,Washington, DC 20555–0001.

Dr. Anthony J. Baratta, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission,Washington, DC 20555–0001.

Dr. David L. Hetrick, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission,Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302.

Issued at Rockville, Maryland this 6th day of August 2004.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 04–18432 Filed 8–11–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–348 and 50–364]

Southern Nuclear Operating Company, Inc, Joseph M. Farley Nuclear Power Plant, Units 1 and 2; Notice of Availability of the Draft Supplement 18 to Generic Environmental Impact Statement and Public Meeting for the License Renewal of Joseph M. Farley Nuclear Power Plant, Units 1 and 2

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC, the Commission) has published a draft plant-specific supplement to the Generic Environmental Impact Statement (GEIS), NUREG–1437, regarding the renewal of operating licenses NPF–2 and NPF–8 for an additional 20 years of operation at Joseph M. Farley Nuclear Power Plant (FNP). FNP is located in Houston County, Alabama, approximately 16.5 miles east of the City of Dothan, Alabama. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

The draft Supplement to the GEIS is available for public inspection in the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, or from the Publicly Available Records (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* (the Public Electronic Reading Room). Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the PDR reference staff at 1 (800) 397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*. In addition, the Houston Love Memorial Library, 212 West Burdeshaw Street, Dothan, Alabama and the Lucy Maddox Memorial Library, 11880 Columbia Street, Blakely, Georgia, have agreed to make the draft plant-specific supplement to the GEIS available for public inspection.

Any interested party may submit comments on the draft supplement to the GEIS for consideration by the NRC staff. To be certain of consideration, comments on the draft supplement to the GEIS and the proposed action must be received by November 5, 2004. Comments received after the due date will be considered if it is practical to do so, but the NRC staff is able to assure consideration only for comments received on or before this date. Written comments on the draft supplement to the GEIS should be sent to: Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Comments may be hand-delivered to the NRC at 11545 Rockville Pike, Room T–6D59, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays. Electronic comments may be submitted to the NRC by e-mail at *FarleyEIS@nrc.gov*. All comments received by the Commission, including those made by Federal, State, and local agencies, Native American Tribes, or other interested persons, will be made available electronically at the Commission's PDR in Rockville, Maryland, and from the PARS component of ADAMS.

The NRC staff will hold a public meeting to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document. The public meeting will be held on September 30, 2004, at the Quality Inn, 3053 Ross Clark Circle, Dothan, Alabama. There will be two sessions to accommodate interested parties. The first session will commence at 1:30 p.m. and will continue until 4:30 p.m. The second session will commence at 7 p.m. and will continue until 10 p.m. Both meetings will be transcribed and will include: (1) A presentation of the contents of the draft plant-specific supplement to the GEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No comments on the draft supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing, as discussed below. Persons may pre-register to attend or present oral comments at the meeting by contacting Mr. Jack Cushing be telephone at 1 (800) 368–5642, extension 1424, or by e-mail at *FarleyEIS@nrc.gov* no later than September 24, 2004. Members of the public may also register to provide oral comments within 15 minutes of the start of each session. Individual, oral comments may be limited by the time available, depending on the number of persons who register. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Mr. Cushing's attention no later than September 24, 2004, to provide the NRC staff adequate notice to determine whether the request can be accommodated.

FOR FURTHER INFORMATION CONTACT: Jack Cushing, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Mr. Cushing may be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 6th day of August, 2004.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 04–18435 Filed 8–11–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards, Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on September 8, 2004, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Wednesday, September 8, 2004—9:30 a.m.–11:30 a.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Sam Duraiswamy (telephone: (301) 415–7364) between 7:30 a.m. and 4:15 p.m. (ET) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted only during those portions of the meeting that are open to the public.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4:15 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes in the agenda.

Dated August 6, 2004.

Michael R. Snodderly,

Acting Associate Director for Technical Support, ACRS/ACNW.

[FR Doc. 04–18433 Filed 8–11–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards, Subcommittee Meeting on Safeguards and Security; Postponed

The ACRS Subcommittee on Safeguards and Security scheduled for August 24–26, 2004, at Sandia National Laboratories, Albuquerque, New Mexico has been postponed. The meeting will be rescheduled at a future date when the work that was scheduled for discussion has been completed. Notice of this meeting was published in the **Federal Register** on Monday, July 26, 2004 (69 FR 44553).

For further information contact: Dr. Richard P. Savio (telephone: (301) 415–7362) or Mr. Richard K. Major (telephone: (301) 415–7366) between 7:30 a.m. and 4:15 p.m. (ET).

Dated: August 6, 2004.

Michael R. Snodderly,

Acting Associate Director for Technical Support, ACRS/ACNW.

[FR Doc. 04–18434 Filed 8–11–04; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the

Securities and Exchange Commission will hold the following meetings during the week of August 16, 2004:

Closed Meetings will be held on Tuesday, August 17, 2004 at 2 p.m. and Thursday, August 19, 2004 at 2 p.m.

An Open Meeting will be held on Wednesday, August 18, 2004 at 10 a.m., in Room 1C30, the William O. Douglas Meeting Room.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meetings. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meetings.

Commissioner Goldschmid, as duty officer, voted to consider the items listed for the closed meetings in closed sessions.

The subject matter of the Closed Meeting scheduled for Tuesday, August 17, 2004 will be:

Formal orders of investigations;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature; and

Adjudicatory matters.

The subject matter of the Open Meeting scheduled for Wednesday, August 18, 2004 will be:

1. The Commission will consider whether to adopt amendments to rule 12b–1 under the Investment Company Act of 1940. The amended rule would prohibit investment companies from paying for the distribution of their shares with brokerage commissions. For further information, please contact William Middlebrooks at (202) 942–0690.

2. The Commission will consider whether to adopt amendments to Forms N–1A, N–2, N–3, and N–CSR that are designed to improve the disclosure provided by mutual funds and closed-end funds about their portfolio managers. The amendments would extend the existing requirement that a fund provide basic information in its prospectus regarding its portfolio manager to members of management teams. The amendments would also require a fund to disclose additional information about its portfolio managers in its Statement of Additional Information (and, for closed-end funds, in reports on Form N CSR), including other accounts they manage, compensation structure, and ownership of securities in the fund. For further information, please contact Sanjay Lamba at (202) 942–7926.

The subject matter of the Closed Meeting scheduled for Thursday, August 19, 2004 will be:

Formal orders of investigations;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Amicus consideration; and

Regulatory matter regarding financial institutions.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: the Office of the Secretary at (202) 942–7070.

August 10, 2004.

Jonathan G. Katz,

Secretary.

[FR Doc. 04–18529 Filed 8–10–04; 12:11 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50147; File No. SR–OPRA–2004–02]

Options Price Reporting Authority; Order Approving an Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information and Amendment No. 1 Thereto To Eliminate From the Plan References to the Fee Exemption Pilot Currently Provided for in the Plan

August 4, 2004.

On May 7, 2004, the Options Price Reporting Authority ("OPRA") submitted to the Securities and Exchange Commission ("Commission"), pursuant to section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 11Aa3–2 thereunder,[2] an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan").[3] On June 23, 2004, OPRA submitted Amendment No. 1 to the proposal.[4] The proposed amendment would eliminate from the OPRA Plan references to the fee exemption pilot that expired on May 31, 2004. Notice of the proposal, as modified by Amendment No. 1, was published in the **Federal Register** on July 8, 2004.[5] The Commission received no comment letters on the proposed OPRA Plan amendment. This order approves the proposal, as amended.

The purpose of the proposed OPRA Plan amendment is to eliminate references to the fee exemption pilot in section VII(d)(vi) of the OPRA Plan that provided a temporary exemption from OPRA fees for members of exchanges that were parties to the OPRA Plan and that acted as brokers or dealers on traditional exchange trading floors or as specialists or market makers on electronic exchanges or electronic facilities of exchanges. OPRA also proposes to eliminate section V(e) of the OPRA Plan, which provided that parties to the OPRA Plan could access OPRA information on their trading floors or at their other business locations without being obligated to pay fees to OPRA. OPRA states that the effect of the proposed amendment would be to make all devices that are used to access options market information furnished by OPRA subject to OPRA's information fees.

OPRA also proposes to amend the definitions of "vendor" and "subscriber" set forth in paragraphs (k) and (l) of section II of the OPRA Plan to confirm that the receipt of options market data by an exchange over devices maintained by such exchange at its business locations would not involve redistribution of the data by such exchange, notwithstanding that members of such exchange could be able to access the information over those devices. Finally, as a matter of "housekeeping," OPRA proposes to delete from section V(c)(i) of the OPRA Plan language concerning the introduction of OPRA's BBO Service in 2003 since the BBO Service is now in place.

After careful review, the Commission finds that the proposed OPRA Plan amendment is consistent with the

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[1] 15 U.S.C. 78k-1.

[2] 17 CFR 240.11Aa3–2.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to section 11A of the Act and Rule 11Aa3–2 thereunder. *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The six participants to the OPRA Plan are the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

[4] *See* letter from Michael L. Meyer, Counsel to OPRA, Schiff Hardin LLP, to Deborah Flynn, Assistant Director, Division of Market Regulation, Commission, dated June 22, 2004, replacing in its entirety the initial proposal filed on May 7, 2004.

[5] *See* Securities Exchange Act Release No. 49958 (July 1, 2004), 69 FR 41312.

requirements of the Act and the rules and regulations thereunder.[6] The Commission believes that the proposed OPRA Plan amendment is consistent with section 11A of the Act[7] and Rule 11Aa3–2 thereunder[8] in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system.

Specifically, given the expiration of the fee exemption pilot for accessing OPRA information, the Commission finds that it is appropriate to eliminate any references within the OPRA Plan to such fee exemption so as to avoid confusion. Moreover, the Commission believes that subjecting all devices used to access OPRA information, whether on-floor or off-floor, to OPRA's information fees should help to ensure that the various participants do not receive disparate treatment under the OPRA Plan. The Commission also believes that OPRA's proposed amendments to the definitions of "vendor" and "subscriber" and the deletion of language concerning the introduction of its BBO Service should promote clarity within the language of the OPRA Plan.

It is therefore ordered, pursuant to section 11a of the Act,[9] and Rule 11Aa3–2 thereunder,[10] that the proposed OPRA Plan amendment (SR-OPRA–2004–02), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18421 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[6] In approving this proposed OPRA Plan amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78k-1.

[8] 17 CFR 240.11Aa3–2.

[9] 15 U.S.C. 78k-1.

[10] 17 CFR 240.11Aa3–2.

[11] 17 CFR 200.30–3(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50154; File No. SR–BSE–2003–09]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to the Extension of Certain Listed Trading Rules to the Trading of Nasdaq Securities

August 5, 2004.

On July 2, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to extend certain of its listed trading rules to the trading of Nasdaq securities. On April 5, 2004, the Exchange amended the proposed rule change.[3] On May 6, 2004, the Exchange amended the proposed rule change.[4]

The proposed rule change was published for comment in the **Federal Register** on June 7, 2004.[5] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

The proposed rule change would add two new sections to the BSE's Rules relating to the trading of Nasdaq securities on the Exchange. The first proposed new section, "Section 30. Competing Specialist Initiative," would permit specialists who trade Nasdaq securities on the BSE to avail themselves of the Exchange's competing specialist program. The second proposed new section, "Section 31. Remote Trading in Nasdaq Securities," would extend the BSE's BEACON Remote trading program to include Nasdaq trading.[6] In both cases, the proposed new rules would track the language contained in corresponding existing rules relating to listed securities. For example, the BEACON Remote trading program requirements currently applicable to the trading of listed securities, including the applicability of other BSE Rules, confidentiality, "Chinese Walls," communications, and Electronic Trading Permits ("ETPs"), would apply with respect to the remote trading of Nasdaq securities.

The Commission notes that the Exchange has represented that, as with current BEACON Remote locations, the Exchange's Compliance Department will physically inspect each remote Nasdaq location. Likewise, the proposed rule change includes ETP provisions that require, among other things, that all registered specialists and clerks complete a floor-training program, unless waived under certain exceptional circumstances, as well as successfully complete the BSE floor examination and the Series 63 (NASAA Uniform State Law Exam).[7] In addition, each registered clerk in a remote location who qualifies for an ETP would be required to operate under the direct supervision of a registered specialist at such remote location, just as a registered clerk is supervised in the on-floor environment.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] The Commission believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5),[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest. Specifically, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from John Boese, Vice President, Legal and Compliance, Exchange, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 2, 2004 ("Amendment No. 1"). In Amendment No. 1, the Exchange restated the proposed rule change in its entirety.

[4] *See* letter from John Boese, Chief Regulatory Officer, Exchange, to Nancy Sanow, Assistant Director, Division, Commission, dated May 5, 2004 ("Amendment No. 2"). In Amendment No. 2, the Exchange restated the proposed rule change in its entirety.

[5] *See* Securities Exchange Act Release No. 49771 (May 25, 2004), 69 FR 31851.

[6] The BSE's BEACON Remote trading system was approved by the Commission on August 8, 2000. *See* Securities Exchange Act Release No. 43127 (August 8, 2000), 65 FR 49617 (August 14, 2000) (SR–BSE–99–1).

[7] According to the BSE, the on-site floor training includes, among other things: Communication procedures with Front Desk Operations, Surveillance, Systems Support; Competing Specialist Initiative and Unlisted Trading Privilege applications and procedures; stock allocation procedures; trading halt procedures; and availability of books and records.

[8] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

Exchange's proposal permits BSE members who trade Nasdaq securities to trade from a remote location subject to the same requirements and surveillance that are currently in place with respect to remote trading of listed securities.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change, as amended (SR–BSE–2003–09), is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18423 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50158; File No. SR–NASD–2004–117]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Extending the Operative Date for the Short-Sale ACT Reporting Requirements for Certain Securities

August 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 2, 2004, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has filed this proposed rule change pursuant to Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to extend, for certain securities, the operative date of NASD IM–6130 ("Trade Reporting of Short Sales") regarding members' obligations to indicate on their transaction reports whether a sale is a short sale or a short sale exempt transaction. Specifically, Nasdaq proposes to extend the operative date to September 26, 2004, with respect to securities eligible to be quoted on the Over the Counter Bulletin Board ("OTCBB") or other non-Nasdaq equity securities. No changes to the text of the NASD rules are required by this proposed rule change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 20, 2004, Nasdaq filed a proposed rule change that established NASD IM–6130 regarding members' obligations to indicate on their transaction reports whether a transaction was a short sale or short exempt.[5] That proposed rule change was immediately effective, but Nasdaq delayed its operative date for sixty days, until July 26, 2004, to allow members adequate time to comply with their obligations.

Based upon feedback received in a comment letter[6] and from the staff of the Division of Market Regulation of the Commission, Nasdaq has determined to extend the operative date for NASD IM–6130 for an additional sixty days with respect to certain stocks. Specifically, a commenter stated that it will be unable to comply with its obligations under NASD IM–6130 with respect to securities eligible to be quoted on the OTCBB or in other non-Nasdaq equity securities.[7] In response to such comments, Nasdaq proposes to allow firms, with respect to OTCBB and non-Nasdaq equity securities, an additional 60-day period to re-program their systems in order to comply with NASD IM–6130. Therefore, the operative date for compliance with NASD IM–6130 will remain July 26, 2004 for all Nasdaq National Market, SmallCap, and exchange-listed securities and the operative date for OTCBB and non-Nasdaq equity securities will be extended to September 24, 2004.

NASD will publish a Notice to Members announcing the new operative date for compliance with NASD IM–6130 for OTCBB and non-Nasdaq securities.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[8] in general and with Section 15A(b)(6) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Nasdaq believes the proposed rule change is consistent with the Act in that it clarifies short sale reporting requirements and promotes compliance with and regulation of short sale requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act,[10] and Rule 19b–4(f)(1) thereunder,[11] because it constitutes a stated practice with respect

[5] *See* Securities Exchange Act Release No. 49833 (June 8, 2004) 69 FR 33969 (June 17, 2004).

[6] Letter from R. Cromwell Coulson, Chief Executive Officer, Pink Sheets LLC, to Jonathan G. Katz, Secretary, Commission, dated June 24, 2004 ("Pink Sheets Letter").

[7] *Id.*

[8] 15 U.S.C. 78*o*–3.

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

to the enforcement of an existing NASD rule.

At any time within 60 days of the filing of the proposed rule change, pursuant to Section 19(b)(3)(A) of the Act,[12] the Commission may summarily abrogate the proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–117 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–117. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–117 and should be submitted on or before September 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18414 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50144; File No. SR–NASD–2004–115]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Amendments To Reduce the Fee for the Regulatory Element of the Continuing Education Program

August 4, 2004

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 27, 2004 the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend Section 4 of Schedule A to the NASD By-Laws to reduce fees for the Regulatory Element of the continuing education requirements of NASD Rule 1120.[3] Below is the text of the proposed rule change. Proposed new language is in *italics*. Proposed deletions are in [brackets].

SCHEDULE A TO NASD BY-LAWS

Section 4—Fees

(a) through (l) No change.

(m) There shall be a session fee of [$65.00] *$60.00* assessed as to each individual who is required to complete the Regulatory Element of the Continuing Education Requirements pursuant to Rule 1120.

(n) through (o) No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Regulatory Element, a computer-based education program administered by NASD to help ensure that registered persons are kept up-to-date on regulatory, compliance, and sales practice matters in the industry, is a component of the Securities Industry Continuing Education Program ("Program") under NASD Rule 1120. The Securities Industry/Regulatory Council on Continuing Education ("Council")[4] was organized in 1995 to facilitate cooperative industry/regulatory coordination of the administration and future development of the Program in keeping with applicable industry regulations and changing industry needs. Its roles include recommending and helping develop specific content and questions for the Regulatory Element, defining minimum core curricula for the Firm Element component of the Program, and developing and updating information

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASD filed a proposed rule change (for immediate effectiveness under Section 19(b)(3) of the Act) to reduce the Regulatory Element continuing education fees from $65 to $60 on December 24, 2003 (the "original rule proposal"). While a signed receipt for the original rule proposal was obtained upon arrival at the SEC's premises, the original rule proposal was never delivered to the SEC's Division of Market Regulation.

[4] As of the date of this rule filing, the Council consists of 17 individuals, six of whom represent self-regulatory organizations (the American Stock Exchange LLC, the Chicago Board Options Exchange, Inc., the Municipal Securities Rulemaking Board, NASD, the New York Stock Exchange, Inc., and the Philadelphia Stock Exchange, Inc.) and 11 whom represent the industry.

about the Program for industry-wide dissemination.

It is the Council's responsibility to maintain the Program on a revenue neutral basis while maintaining adequate reserves. In its annual financial review, the Council analyzed projected revenues and expenses through 2008. The analysis showed that the current surplus, which is adequate for the Program's needs, would likely grow over the next two years if Regulatory Element volumes continue at current levels and the fee is maintained at $65 per session. The analysis also showed that reserves would remain adequate if the fee for a Regulatory Element session were reduced by $5 per session. As such, at its December 2003 meeting, the Council unanimously supported a reduction of the fee that firms pay when their registered persons take the Regulatory Element from $65 to $60 per session. This is the second reduction in fees since the Program began in 1995. The first was a reduction of $10 (from $75 to $65) that took place in 1999.[5]

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[6] in general, and with Section 15A(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls.

A. Self-Regulatory Organization's Statement on Burden on Competition

NASD believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal offices of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–115 and should be submitted on or before September 2, 2004.

IV. Commission's Finding and Order Granting Accelerated Approval of Proposed Rule Changes

NASD has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the 30th day after publication in the **Federal Register**. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NASD and, in particular, the requirements of Section 15A and the rules and regulations thereunder. After careful review the Commission finds that the proposed rule change is consistent with the requirements of Section 15A(b)(5) of the Act[8] because it provides for the equitable allocation of reasonable dues, fees, and other charges among members, issuers, and other persons using any facility or system which the association operates.[9] Specifically, the proposed fee reduction will enable the Program to be maintained on a revenue neutral basis while simultaneously reducing the fee charged to members.

The Commission finds good cause to approve the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The NASD represents that the original rule proposal was delivered to the SEC for filing on December 24, 2003. The Commission notes that while a signed receipt for the original rule proposal was obtained upon arrival at the SEC's premises, the original rule proposal was never received by the SEC's Division of Market Regulation. The original rule proposal was filed for immediate effectiveness under Section 19(b)(3) of the Act with an implementation date of January 1, 2004. As such, NASD made changes to Web Central Registration Depository (Web CRD®) to charge members the reduced $60 fee beginning January 1, 2004 consistent with the actions of the Council. Accordingly, this rule change also is effective retroactive to January 1, 2004. Based on the above, the Commission believes that there is good cause, consistent with Section 15A(b)(5)[10] and Section 19(b)(2) of the Act[11] to approve the proposal on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–NASD–2004–115) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18416 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[5] Securities Exchange Act Release No. 40851 (December 28, 1998), 64 FR 554 (January 5, 1999) (SR–NASD–98–95).

[6] 15 U.S.C. 78*o*-3.

[7] 15 U.S.C. 78*o*-3(b)(5).

[8] 15 U.S.C. 78*o*-3(b)(5).

[9] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78*o*-3(b)(5).

[11] 15 U.S.C. 78s(b)(2).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50149; File No. SR–NASD–2004–099]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Permitting ITS/CAES Market Makers To Use the Automatic Quote Refresh Functionality for ITS Securities

August 5, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 25, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has filed this proposed rule change pursuant to section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 4701 ("Definitions") and NASD Rule 4710 ("Participant Obligations in the Nasdaq Market Center") to allow market makers that trade Intermarket Trading System securities ("ITS/CAES market makers") to use the Automatic Quote Refresh functionality. The text of the proposed rule change appears below. New language is in italics. Deleted text is in brackets.

* * * * *

4701. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a)–(d) No Change.

(e) The term "automatic refresh size" shall mean the default size to which a Nasdaq Market Maker's *or ITS/CAES Market Maker's* quote will be refreshed pursuant to NASD Rule 4710(b)(2), if the market maker elects to utilize the Quote Refresh Functionality and does not designate to Nasdaq an alternative refresh size, which must be at least one normal unit of trading. The automatic refresh size default amount shall be 1,000 shares.

(f)–(uu) No Change.

* * * * *

4710. Participant Obligations in the Nasdaq Market Center

(a) No Change.

(b) Non-Directed Orders

(1) No Change.

(2) Refresh Functionality

(A) No Change.

(B) Auto Quote Refresh ("AQR")—Once a Nasdaq Market Maker's *or ITS/CAES Market Maker's* Displayed Quote/Order size and Reserve Size on either side of the market in the security has been decremented to an amount less than one normal unit of trading due to Nasdaq Market Center executions, the Nasdaq Market Maker *or ITS/CAES Market Maker* may elect to have The Nasdaq Stock Market refresh the market maker's quotation as follows:

(i) Nasdaq will refresh the market maker's quotation price on the bid or offer side of the market, whichever is decremented to an amount less than a normal unit of trading, by a price interval designated by the Nasdaq Market Maker *or ITS/CAES Market Maker;* and

(ii) Nasdaq will refresh the market maker's displayed size to a level designated by the Nasdaq Market Maker *or ITS/CAES Market Maker,* or in the absence of such size level designation, to the automatic refresh size.

(iii) This functionality shall produce an Attributable Quote/Order.

(iv) The AQR functionality described in this subparagraph shall only be available for use in connection with a Nasdaq Market Maker's *or ITS/CAES Market Maker's* "Legacy Quote." This functionality shall be available only to Nasdaq Market Makers *or ITS/CAES Market Makers.*

[(v) The AQR functionality shall not be available to any participant for any ITS Security.]

(3)–(8) No Change.

(c)–(e) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On March 2, 2004, the Commission approved Nasdaq's proposal to transition the trading of exchange-listed securities in the Nasdaq Market Center to the same platform that Nasdaq uses for trading Nasdaq-listed securities.[5] Currently, NASD Rule 4710(b)(2)(B) allows market makers in Nasdaq securities to have their quote refreshed automatically in the event that the existing quote, on either side of the market, is decremented to less than one normal unit of trading (*i.e.*, 100 shares) following an execution. This functionality, known as "Auto Quote Refresh" or "AQR," refreshes the market maker's quote to a price level and size that is designated by the market maker in advance.[6] According to Nasdaq, market makers use AQR to manage their quotations and to fulfill their quotation obligations.[7] In the absence of AQR, market makers manage their quotes manually or via their firm's own quote management system. Nasdaq states that AQR is completely voluntary, but widely used in the trading of Nasdaq securities.

The AQR functionality is not currently available to market makers in ITS securities. Nasdaq states that when it proposed the new platform for the trading of ITS securities, it decided not to offer the AQR functionality to expedite the launch of the system. Nasdaq believes that removing the AQR functionality for ITS securities allowed Nasdaq to focus on the modification of the trading platform to accommodate the requirements of the ITS Plan, as well as on the functionality that Nasdaq believed was critical to market participants. Nasdaq believes that it is now able to add the AQR functionality

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 49349 (March 2, 2004), 69 FR 10775 (March 8, 2004) (approving SR–NASD–2003–149).

[6] Market makers may designate their quotes in round lots only. Telephone conversation between Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, and Lisa N. Jones, Special Counsel and Marisol Rubecindo, Attorney, Division of Market Regulation, Commission, on August 3, 2004.

[7] Nasdaq notes that for purposes of Rule 11Ac1–1(c) under the Act, quotes generated by the AQR functionality are considered firm. 17 CFR 11Ac1–1(c).

to the tools available for trading ITS securities. Nasdaq believes that the AQR functionality should benefit investors by assisting ITS/CAES market makers in maintaining continuous two-sided quotes and providing added liquidity to the market following an execution.[8]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[9] in general and with section 15A(b)(6) of the Act,[10] in particular, which requires that the rules of the NASD be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes that the current proposal is consistent with those objectives in that it increases transparency, liquidity and order interaction in ITS securities in the Nasdaq Market Center.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment for (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–099 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–099. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–099 and should be submitted on or before September 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18419 Filed 8–12–04; 8:45 am]

BILLING CODE 8010–01–P

[8] Nasdaq notes that it will notify market participants of the operative date of the proposal via Head Trader Alert on *www.nasdaqtrader.com*.

[9] 15 U.S.C. 78*o*–3.

[10] 15 U.S.C. 78*o*–3(b)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50157; File No. SR–NASD–2004–095]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Adopting a Fingerprinting Program for NASD Employees and Independent Contractors in the State of New York, and, as Dictated by Business Need, in Other Jurisdictions

August 5, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 18, 2004, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. The NASD filed the proposed rule change under paragraph (f)(3) of Rule 19b–4 under the Act.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to New York State law, the NASD proposes to adopt a program for conducting fingerprint-based background checks of NASD employees and independent contractors in the State of New York, and in other jurisdictions as business need may dictate.

Below is the text of the proposed rule change. Proposed new language is *italicized.*

* * * * *

Policy To Conduct Fingerprint-Based Background Checks of NASD Employees and Independent Contractors

(a) In accordance with the requirements of the law of the State of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(3).

New York ("New York State"), it shall be the policy of NASD to conduct a fingerprint-based criminal records check of (i) all prospective and current employees located in New York State, and (ii) all prospective and current independent contractors and temporary employees located in New York State who provide services to NASD within New York State and who have access to secure records or systems, or other material or secure buildings or secure property for a specified number of days as determined by NASD from time to time.

(b) As business need may dictate and where permitted by applicable law, NASD will implement a program outside of New York State to conduct a fingerprint-based criminal records check of (i) any or all prospective and current employees, and (ii) any or all prospective and current independent contractors or temporary employees who provide services to NASD and who have access to records or systems, or other material or secure buildings or secure property for a specified number of days as determined by NASD from time to time.

(c) In implementing the program in New York State or in other jurisdictions, NASD shall submit fingerprint images or cards obtained pursuant to the foregoing program to the Attorney General of the United States or his or her designee for identification and processing. NASD shall at all times maintain the security of fingerprint images or cards and information received from the Attorney General or his or her designee.

(d) NASD shall evaluate information received from the Attorney General or his or her designee in accordance with the terms of a written fingerprint policy and provisions of applicable law. A felony or serious misdemeanor conviction will be a factor in considering whether to hire a prospective employee, take adverse employment action with respect to a current employee, or deny prospective or current independent contractors or temporary employees access to NASD's facilities or records.

(e) A prospective employee who refuses to submit to fingerprinting shall be denied employment by NASD, and a prospective independent contractor or temporary employee who refuses to submit to fingerprinting under the program shall be denied access to NASD facilities or records. A current employee, independent contractor, or temporary employee who refuses to submit to fingerprinting under the program will be terminated after having been given notice and three opportunities to comply.

* * * * *

I. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 20, 2002, Governor George E. Pataki signed into law an act that requires fingerprint-based background checks of self-regulatory organization ("SRO") employees who are regularly employed in New York State.[4] The New York law also requires an SRO to fingerprint independent contractors that provide services to the SRO if those individuals have "access to records * * * or other material or secure buildings or secure property, which place the security of [the SRO] at risk."[5] The New York law requires NASD to implement and maintain a fingerprinting program for employees and certain independent contractors in New York State.

Access to the Federal Bureau of Investigation's ("FBI") database of fingerprint-based criminal records is permitted only when authorized by law. Numerous Federal and State laws authorize employers to conduct fingerprint-based background checks that make use of the FBI's database.[6] Notably, section 17(f)(2) of the Act[7] and SEC Rule 17f–2[8] require employees of broker-dealers, transfer agents, and clearing agencies to be fingerprinted and authorize SROs to maintain facilities for processing and storing fingerprint cards and criminal record information received from the FBI database with respect to such cards. Although section 17(f)(2) does explicitly direct the Attorney General of the United States (*i.e.*, the FBI) to provide SROs designated by the Commission with access to criminal history record information, it does not, however, require SROs to fingerprint their own employees. NASD believes, therefore, that a proposed rule change for a fingerprinting program for NASD employees and independent contractors located in New York State is a necessary component of NASD's compliance with New York State law, and of any plan by NASD, as dictated by its assessment of business need, to implement a program for fingerprint-based background checks of its employees and independent contractors in other jurisdictions as permitted by law.

As reflected in the text of the proposed rule change, the program applies to: (1) Prospective and current NASD employees in New York State, as well as prospective and current temporary employees and independent contractors in New York State who have or are anticipated to have access to NASD facilities in New York State or NASD records or systems for a specified number of days as determined by NASD from time to time, and (2) as NASD deems necessary according to business need, to prospective and/or current employees in other jurisdictions, as well as prospective and current temporary employees and independent contractors who have or are anticipated to have access to NASD facilities or records in other jurisdictions.

NASD evaluates information received from the FBI concerning an individual in accordance with the terms of NASD's written fingerprint policy, which reflects the application of employment laws governing the use of information concerning criminal convictions in employment decisions. In accordance with such laws, a felony or serious misdemeanor conviction will be a factor in considering whether to hire a prospective employee, take adverse employment action with respect to a current employee, or deny prospective or current independent contractors or temporary employees access to NASD's facilities or records.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with section 15A(b)(6) of the Act[9], which requires,

[4] 2002 N.Y. Laws 453 (Aug. 20, 2002).

[5] 2002 N.Y. Laws 453 (Aug. 20, 2002).

[6] *See, e.g.*, 42 U.S.C. 5119a (child care providers); Pub. L. 92–544, 86 Stat. 1109, 1115 (employees of federally chartered or insured banks); Alaska Stat. 04.11.295 (liquor license applicants); Ariz. Rev. Stat. 32–122.02 (home inspectors); Cal. Bus. & Prof. Code 6980.18 (locksmiths); Fla. Stat. 468.453 (athlete agents); Official Code Ga. Ann. 43–47–6 (used car dealers); Ohio Rev. Code Ann. 3770.051 (vendors of lottery equipment).

[7] 15 U.S.C. 78q(f)(2).

[8] 17 CFR 240.17f-2.

[9] 15 U.S.C. 78o-3(6).

among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest. NASD believes the proposed rule change will provide a basis for NASD's compliance with New York State law, which requires fingerprint-based background checks of SRO employees who are regularly employed in New York State as well as of independent contractors that provide services to the SRO if those individuals have "access to records * * * or other material or secure buildings or secure property, which place the security of [the SRO] at risk", and further permit NASD to implement a fingerprinting program in other jurisdictions, as business need may dictate.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action.

The proposed rule change has been filed by the NASD pursuant to section 19(b)(3)(A) of the Act [10] and subparagraph (f)(3) of Rule 19b–4 thereunder.[11] Because the foregoing proposed rule change is concerned solely with the administration of the NASD, it has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(3) [13] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment for (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include SR–NASD–2004–095 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to SR-NASD–2004–095. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to SR–NASD–2004–095 and should be submitted on or before September 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18450 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(3)

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(3).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50145; File No. SR–NSX–2004–11]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Stock Exchange Relating to Workstation Fee

August 4, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 2004, National Stock Exchange℠ (the "Exchange" or "NSX") filed with the Securities and Exchange Commission (the "Commission") a proposed rule change. On July 15, 2004, NSX filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, is described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal pursuant to Section 19(b)(3)(A)(ii) of the Act [4] and Rule 19b–4(f)(2) [5] thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its schedule of fees to increase its Workstation Fee. The Exchange implemented these proposed changes, as amended, on July 1, 2004.

Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

Rules of National Stock Exchange

* * * * *

Chapter XI

Trading Rules

* * * * *

Rule 11.10 National Securities Trading System Fees.

A. Trading Fees.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from James C. Yong, Senior Vice President, Regulation and General Counsel of NSX, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated July 14, 2004 ("Amendment No. 1"). In Amendment No. 1, NSX made typographical corrections to its rule text.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

(a)–(q) No change.

(r) Workstation Fee. Every member using the Exchange Workstation shall be charged [$750.00]*$1,000.00* per device per month.

B. No change.

C. No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In addition to utilizing proprietary or third party software, member specialists may connect to NSX's National Securities Trading System or "NSTS," by utilizing an Exchange-supplied Workstation for a monthly fee. Subsection (r) of NSX Rule 11.10(A) currently provides that every member using the Exchange Workstation shall be charged a fee of $750 per device per month. This fee will increase to $1,000 per device per month beginning July 1, 2004. The Exchange believes that the fee increase is reasonable and ensures that each member pays an equitable share of the costs associated with operating the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and with Section 6(b)(4),[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange believes the proposed change, as amended, is also consistent with Section 6(b)(5) of the Act[8] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received in connection with the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4[10] thereunder because it involves a member due, fee or other charge. At any time within sixty (60) days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments should be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an E-mail to *rule-comments@sec.gov*. Please include File Number SR–NSX–2004–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NSX–2004–011. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to file number SR–NSX–2004–011 and should be submitted on or before September 2, 2004.

For the Commission by the Division of Market Regulation, pursuant to the delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18415 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50146; File No. SR–NSX–2004–08]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the National Stock Exchange Relating to Manual Processing Fee

August 4, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 28, 2004, National Stock Exchange℠ (the "Exchange" or "NSX℠") filed with the Securities and Exchange Commission (the "Commission") a proposed rule change. On July 15, 2004, the Exchange filed Amendment No. 1 to the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

rule change.[3] The proposed rule change, as amended, is described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal pursuant to Section 19(b)(3)(A)(ii) of the Act[4] and Rule 19b–4(f)(2)[5] thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its schedule of fees to incorporate a manual processing fee for crosses and meets phoned into the NSX Control Room.[6] The Exchange implemented these proposed changes, as amended, on July 1, 2004.

Below is the text of the proposed rule change, as amended. Proposed new language is *italicized;* proposed deletions are in brackets.

* * * * *

RULES OF NATIONAL STOCK EXCHANGE

* * * * *

CHAPTER XI Trading Rules

* * * * *

Rule 11.10 National Securities Trading System Fees

A. Trading Fees

(a) No change.

(b) Odd-Lot Transactions. Members will be charged $0.50 per odd-lot transaction when acting as agent or principal, except that members will earn a credit of $0.50 for every four round-lot transactions executed (agency, professional agency or principal) on the [CSE]*Exchange* and printed on the Consolidated Tape by the Exchange. Notwithstanding the forgoing credit, there will be a minimum charge of $0.10 per odd-lot transaction.

(c)–(d) No change.

(e) *Crosses and Meets*

(1)–(3) No change.

(4) Users executing crosses and meets in Tape A, B or C securities through the Exchange's System Supervisory Center shall be charged $15 per contra-party, up to a maximum of $75 per side of transaction. This transaction fee shall be in lieu of any transaction fee otherwise applicable under Paragraphs (A)(e)(1) through (A)(e)(3) above.

(f) No change.

(g) Proprietary (Principal) Transactions

(1) (A) All Designated Dealers in securities other than Nasdaq securities, except those acting as Preferencing Dealers or Contributing Dealers, will be charged $0.0025 per share ($0.10/100 shares) for principal transactions.

(B) No change.

(2)–(4) No change.

(h)–(j) No change.

(k) Tape "B" Transactions. *Except as provided in Paragraph (A)(e)(4) above, the* [The] Exchange will not impose a transaction fee on Consolidated Tape "B" securities. In addition, Members will receive a 50 percent pro rata transaction credit of gross Tape "B" revenue; provided that, however, calculation of the transaction credit will be based on net Tape "B" revenues in those fiscal quarters where the overall revenue retained by the Exchange does not offset actual expenses and working capital needs. To the extent market data revenue from Tape "B" transactions is subject to year-end adjustment, credits provided under this program may be adjusted accordingly.

(l)–(r) No change.

B. No change.

C. No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, orders can be entered on the Exchange either via an electronic connection or by phoning the NSX Control Room. There is currently no transaction charge for Users, who are not registered as Qualified or Designated Dealers, executing crosses and meets in Tape B and C securities whether electronically or manually processed.[7] For Users executing crosses and meets in Tape A securities, there is currently a charge of $0.0005 per share per side for average daily volume up to 5 million shares per day and $0.000025 per share per side for average daily volume above 5 million shares, with a maximum charge of $37.50 per firm per side of transaction, whether electronically or manually processed. The Exchange is proposing to introduce a manual processing fee of $15 per contra-party, with a cap of $75 per side, on every cross or meet phoned into the NSX Control Room because of the additional resources and expense associated with processing phoned-in orders. The proposed manual processing fee will be in lieu of, and not in addition to, the fees currently assessed for crosses and meets and Tape A, Tape B and Tape C securities.[8] The Exchange believes that the implementation of this manual processing fee is reasonable and ensures that each member pays an equitable share of the costs associated with operating the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change, as amended, is consistent with Section 6(b) of the Act,[9] in general, and with Section 6(b)(4) of the Act,[10] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange believes the proposed change, as amended, is also consistent with Section 6(b)(5) of the Act[11] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in

[3] *See* Letter from James C. Yong, Senior Vice President, Regulation and General Counsel of the NSX, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated July 14, 2004 ("Amendment No. 1"). In Amendment No. 1, NSX made technical corrections to its rule text and clarified that the manual processing fee proposed as NSX Rule 11.10(A)(e)(4) will be in lieu of the fees currently assessed for crosses and meets in Tape A, Tape B and Tape C securities.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

[6] The Exchange is also proposing two non-material revisions to its fee schedule to change one reference to the "CSE" (the Exchange was formerly known as The Cincinnati Stock Exchange or "CSE") to the "Exchange" and to correct a typographical error. The Exchange represents that these changes are administrative and non-substantive in nature and therefore not subject to notice and comment. *See* Amendment No. 1.

[7] Dealers executing crosses in Tape B securities are not charged a transaction fee. Dealers executing crosses in Tape C securities are charged a per share fee of $0.001 per share for average daily volume up to 5 million shares per day and $0.000025 per share for average daily volume 5 million shares and above per day.

[8] *See* Amendment No. 1.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest. The Exchange also believes that the proposed change, as amended, will create incentives for members to electronically connect to the Exchange trading system, thereby increasing efficiency and competition, which, in turn, will enhance the National Market System.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received in connection with the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [12] and subparagraph (f)(2) of Rule 19b–4 [13] thereunder, because it involves a member due, fee or other charge. At any time within sixty (60) days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments should be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an E-mail to *rule-comments@sec.gov*. Please include File Number SR–NSX–2004–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NSX–2004–08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to file number SR–NSX–2004–08 and should be submitted on or before September 2, 2004.

For the Commission by the Division of Market Regulation, pursuant to the delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18420 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50143; File No. SR–PCX–2004–47]

Self-Regulatory Organizations; Order Granting Approval to a Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. To Eliminate the Ability of Floor Brokers and Market Makers To Manually Trade With Orders and Quotes With Size in the Consolidated Book

August 4, 2004.

On June 10, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b-4 thereunder,[2] a proposed rule change to eliminate PCX Rule 6.76(d)(2), which allows a Market Maker or Floor Broker to manually trade with orders and Quotes with Size [3] in the Consolidated Book [4] by vocalizing a bid or offer in a particular series and effecting a trade with the Order Book Official ("OBO"). On June 22, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[5] The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on July 1, 2004.[6] The Commission received no comments on the proposal, as amended. This order approves the proposed rule change, as amended.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange [7] and, in particular, the requirements of section 6(b)(5) of the Act [8] and the rules and regulations thereunder. Specifically, the Commission finds that the proposed rule change, as amended, is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

With this proposal, Market Makers and Floor Brokers will be able to interact with the Consolidated Book by electronic means only. The Exchange represented that manually effecting a trade with an OBO is not as efficient as effecting a trade electronically using the PCX Plus technology. Accordingly, the Commission believes that the proposal, which has the effect of requiring that all trades with orders and Quotes with Size in the Consolidated Book be executed electronically, should enhance the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* PCX Rule 6.1(b)(33).

[4] *See* PCX Rule 6.1(b)(37).

[5] *See* letter from Steven B. Matlin, Senior Attorney, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated June 21, 2004 ("Amendment No 1"). In Amendment No. 1, the Exchange clarified the language describing the PCX Plus platform.

[6] *See* Securities Exchange Act Release No. 49912 (June 24, 2004), 69 FR 39995.

[7] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(5).

efficiency of trading with orders and Quotes with Size in the Consolidated Book. The Commission notes that this proposal does not change the manner in which Floor Brokers and Market Makers effect transactions with options that do not trade on PCX Plus.[9]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[10] that the proposed rule change (File No. SR–PCX–2004–47), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18417 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50153; File No. SR–PCX–2004–73]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to the Handling of Orders Pursuant to Intermarket Option Linkage

August 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 21, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On August 3, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend PCX Rules 6.93 and 6.94. These rules set forth the way orders are handled through Intermarket Option Linkage ("Linkage"). The text of the proposed rule change, as amended, is available at the offices of the Exchange and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend PCX Rules 6.93 and 6.94 to make administrative changes necessary as a result of the Exchange's change to a demutualized structure.[4] PCX filed the recently approved changes to PCX Rules 6.93 and 6.94 prior to the Commission's approval of a demutualized structure. The Commission approved the proposed changes to PCX Rules 6.93 and 6.94 following the approval of the demutualized structure.[5] The approval of the demutualized PCX Rules eliminated references to PCX Members and replaced such references with Option Trading Permits. As a result of the changes, the Exchange no longer retains any Members, and PCX Rules 6.93 and 6.94 must therefore be modified to comply with the approved demutualized PCX Rules.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to facilitate transactions in securities, to promote just and equitable principles of trade, to enhance competition and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange did not solicit nor receive any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(iii) of the Act[8] and subparagraph (f)(3) of Rule 19b–4[9] thereunder because it is concerned solely with the administration of the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

[9] Phone conversation between Kelly Riley, Assistant Director, Division of Market Regulation, Commission, and Steve B. Matlin, Senior Attorney, Regulatory Policy, PCX, August 3, 2004.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated August 3, 2004 ("Amendment No. 1"). In Amendment No. 1, the Exchange submitted a new Form 19b–4, which replaced and superceded the original filing in its entirety.

[4] *See* Securities Exchange Act Release No. 49718 (May 17,2004), 69 FR 29611 (May 24, 2004) (SR–PCX–2004–08) (order approving PCX demutualization).

[5] *See* Securities Exchange Act Release Nos. 49890 (June 17, 2004), 69 FR 36145 (June 28, 2004) (SR–PCX–2004–33) (order approving a change to handling of Principal Acting as Agent Orders submitted through Linkage) and 49967 (July 2, 2004), 69 FR 41871(July 12, 2004) (SR–PCX–2004–34) (order approving a change to the handling of Satisfaction Orders submitted through Linkage).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(3).

[10] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under section 19(b)(3)(C) of the Act, the Commission considers that period to commence on August 3, 2004, the date PCX filed Amendment No. 1 to the proposed rule change. *See* 15 U.S.C. 78s(b)(3)(C).

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX 2004–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–PCX–2004–73. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml)*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX 2004–73 and should be submitted on or before September 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18418 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50152; File No. SR–PCX–2004–61]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Pacific Exchange, Inc. To Extend Until June 5, 2005, a Pilot Program Under Which It Lists Options on Selected Stocks Trading Below $20 at One-Point Intervals

August 5, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on August 3, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX proposes to extend until June 5, 2005, a pilot program under which it lists options on selected stocks trading below $20 at $1 strike price intervals ("$1 Strike Pilot Program"). The text of the proposed rule change is available at the Office of the Secretary, PCX, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, PCX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. PCX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposal is to extend the PCX's $1 Strike Pilot Program until June 5, 2003. The current $1 Strike Pilot Program expires on August 4, 2004. PCX states that its member firms have expressed a continued interest in listing additional strike prices on low priced stocks so that they can provide their customers with greater flexibility in their investment choices. For this reason, PCX proposes to extend the $1 Strike Pilot Program. PCX notes that all of the issues eligible to be included in the $1 Strike Pilot Program, the procedures for adding $1 strike intervals, the procedures for phasing out $2.50 strike price intervals, the prohibition against listing long-term options (also known as "LEAPS") in equity option classes at $1 strike price intervals, the procedures for adding expiration months and the procedures for deleting $1 strike intervals will all remain the same.[3]

2. Statutory Basis

PCX believes that the continuation of the $1 Strike Pilot Program will stimulate customer interest in options overlying lower-priced stocks by creating greater trading opportunities and flexibility. PCX further believes that continuation of the $1 Strike Pilot Program will provide customers with the ability to more closely tailor investment strategies to the precise movement of the underlying security. For these reasons, PCX believes the proposed rule change is consistent with the Act and the rules and regulations thereunder and, in particular, the requirements of section 6(b) of the Act.[4] Specifically, PCX believes the proposed rule change is consistent with the requirements under section 6(b)(5)[5] that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] The Commission approved the $1 Strike Pilot Program on June 17, 2003. *See* Securities Exchange Act Release No. 48045 (June 17, 2003); 68 FR 37549 (June 24, 2003) ("Pilot Program Approval Order"). *See also* Securities Exchange Act Release No. 49818 (June 4, 2004), 69 FR 33440 (June 15, 2004) (notice of filing and immediate effectiveness of File No. SR–PCX–2004–39) (extending the $1 Strike Pilot Program until August 4, 2004) ("Pilot Extension Notice"). The Pilot Program Approval Order and the Pilot Extension Notice required PCX to provide the Commission with certain information and data covering the entire time the $1 Strike Pilot Program was in effect in the event that PCX proposed to, among other things, extend the $1 Strike Pilot Program. Accordingly, PCX has prepared and submitted a report ("Pilot Program Report") that provides data and written analysis relating to the five options classes PCX selected to participate in the $1 Strike Pilot Program.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

PCX does not believe that the proposed rule change, as amended, will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

PCX has not solicited, and does not intend to solicit, comments on this proposed rule change. PCX has not received any unsolicited written comments from its members of other interested persons.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2004–61 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR-PCX–2004–61. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2004–61 and should be submitted on or before September 2, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[6] In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[7] which requires, among other things, that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Commission believes the proposed listing of one point strike price intervals in selected equity options on a pilot basis should provide investors with more flexibility in the trading of equity options overlying stocks trading at more than $3 but less than $20, thereby furthering the public interest by allowing investors to establish equity options positions that are better tailored to meet their investment objectives. The Commission also believes that the Exchange's limited Pilot Program strikes a reasonable balance between the Exchange's desire to accommodate market participants by offering a wide array of investment opportunities and the need to avoid unnecessary proliferation of options series. The Commission expects the Exchange to monitor the applicable equity options activity closely to detect any proliferation of illiquid options series resulting from the narrower strike price intervals and to act promptly to remedy this situation should it occur. In addition, the Commission requests that PCX monitor the trading volume associated with the additional options series listed as a result of the Pilot Program and the effect of these additional series on market fragmentation and on the capacity of the Exchange's, OPRA's, and vendors' automated systems.

The Commission finds good cause for approving the proposal prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Accelerated approval of the proposed rule change is consistent with the protection of investors and the public interest because it will permit the $1 Strikes Pilot Program to continue without interruption through June 5, 2005. For these reasons, the Commission believes that there is good cause, consistent with Sections 6(b)(5) and 19(b) of the Act,[8] to approve the PCX's proposal, as amended, on an accelerated basis.[9]

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[10] that the proposed rule change (SR–PCX–2004–61) is hereby approved on an accelerated basis.

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[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(5) and 78s(b).

[9] If PCX proposes to (1) Extend the $1 Strike Pilot Program beyond June 5, 2005; (2) expand the number of options eligible for inclusion in the $1 Strike Pilot Program; or (3) seek permanent approval of the $1 Strike Pilot Program, it must submit a pilot program report to the Commission along with the filing of such proposal. The pilot program report must cover the entire time the $1 Strike Pilot Program was in effect and must include: (1) Data and written analysis on the open interest and trading volume for options (at all strike price intervals) selected for the $1 Strike Pilot Program; (2) delisted options series (for all strike price intervals) for all options selected for the $1 Strike Pilot Program; (3) an assessment of the appropriateness of $1 strike price intervals for the options PCX selected for the $1 Strike Pilot Program; (4) an assessment of the impact of the $1 Strike Pilot Program on the capacity of the PCX's, OPRA's, and vendors' automated systems; (5) any capacity problems or other problems that arose during the operation of the $1 Strike Pilot Program and how PCX addressed them; (6) any complaints that PCX received during the operation of the $1 Strike Pilot Program and how PCX addressed them; and (7) any additional information that would help to assess the operation of the $1 Strike Pilot Program. The Commission expects PCX to submit a proposed rule change at least 60 days before the expiration of the $1 Strike Pilot Program in the event PCX wishes to extend, expand, or seek permanent approval of the $1 Strike Pilot Program. The Commission notes that the submission of a satisfactory pilot program report along with a proposed rule change to extend, expand, or permanently approve the $1 Strike Pilot Program is a condition precedent to the future operation of the PCX's $1 Strike Pilot Program.

[10] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18451 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50159; File No. SR–Phlx–2004–47]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Legal Fees Incurred by the Exchange

August 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 4, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. Phlx filed this proposal pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to adopt new Phlx Rule 651 to require members, member organizations, foreign currency options participants, foreign currency options participant organizations, or persons associated with any of the foregoing ("member litigants") who bring legal proceedings against the Exchange to reimburse the Exchange for all costs associated with defending such proceedings, only when such persons or entities do not prevail and the Exchange's costs exceed a specified amount. The text of the proposed rule change is below. Proposed new language is in italics.

Rule 651. Exchange's Costs of Defending Legal Proceedings

Any member, member organization, foreign currency options participant, foreign currency options participant organization, or person associated with any of the foregoing who fails to prevail in a lawsuit or other legal proceeding instituted by such person or entity against the Exchange or any of its board members, officers, committee members, employees, or agents, and related to the business of the Exchange, shall pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding, but only in the event that such expenses exceed $50,000.00. This provision shall not apply to disciplinary actions by the Exchange, to administrative appeals of Exchange actions or in any specific instance where the Board[6] has granted a waiver of this provision.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to enable the Exchange to obtain reimbursement of legal costs incurred to defend litigation brought against the Exchange by member litigants where such persons or entities do not prevail in the litigation.

Legal proceedings can significantly divert staff resources away from the Exchange's regulatory and business purposes. In addition, these proceedings often require the Exchange to secure outside counsel—a costly undertaking. The Exchange believes that establishing a rule that may reduce non merit-based or vexatious legal proceedings against the Exchange by member litigants will help protect against Exchange resources being unnecessarily diverted from the Exchange's regulatory and business objectives, thus strengthening the overall organization. To this end, the Exchange is proposing to adopt a rule similar to one already in effect at the American Stock Exchange ("AMEX") and other options exchanges[7] requiring specified persons who bring legal proceedings against the Exchange and/or persons acting on the Exchange's behalf but who do not prevail to reimburse the Exchange for all costs associated with defending such proceedings when these costs exceed fifty thousand dollars ($50,000).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5), specifically,[9] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, by requiring member litigants to reimburse the Exchange for costs of a legal defense under specified circumstances.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] Phlx asked the Commission to waive the 30-day operative delay. *See* Rule 19b–4(f)(6)(iii). 17 CFR 240.19b–4(f)(6)(iii).

[6] *See* e-mail from Jurij Trypupenko, Counsel and Director of Litigation and Operations, Phlx, dated August 4, 2004, which clarifies that "the Board" refers to the Board of Governors of the Philadelphia Stock Exchange.

[7] *See* Securities Exchange Act Release Nos. 47842 (May 13, 2003), 68 FR 27114 (May 19, 2003)(SR–AMEX–2003–35); 37421 (July 11, 1996), 61 FR 37513 (July 18, 1996)(SR–CBOE–96–02); and 37563 (August 14, 1996), 61 FR 43285 (August 21, 1996)(SR–PSE–96–21).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The Exchange requests that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission also notes that the proposed rule change is consistent with existing precedent and that there are no novel issues. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[12]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2004–47 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–47. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml)*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–47 and should be submitted on or before September 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–18422 Filed 8–11–04; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 4800]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: South Asia Professional Exchanges and Training Program for Afghanistan, Bangladesh, India, Pakistan, and Sri Lanka

Announcement Type: New Grant.

Funding Opportunity Number: ECA/PE/C/NEAAF–05–02.

Catalog of Federal Domestic Assistance Number: 00.000.

Application Deadline: October 7, 2004.

Summary: The South Asia/Near East/Africa Division of the Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs (ECA), in cooperation with the South Asia Bureau of the U.S. Department of State, announces an open competition for grants to support exchanges and relationship building between U.S. non-profit organizations and civil society groups in the following South Asian countries: Afghanistan, Bangladesh, India, Pakistan, and Sri Lanka. ECA is most interested in projects which have a regional, multi-country, or cross-border focus, but single-country proposals will also be considered. Proposals should center on groups that work with young people, and should design innovative, short-term, high impact projects that promote mutual understanding between people in the U.S. and people in South Asia and the advancement of one or more of the following themes: excellence in education, democracy enhancement, economic skills promotion, and conflict management.

In this competition, innovative design for short-term, high-impact projects to pursue these themes effectively, and to do so with South Asian partner organizations, will be important to proposal competitiveness. Up to five grants may be awarded, and no award will exceed $200,000. Public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3) may submit proposals for the South Asia Professional Exchanges and Training Program for Afghanistan, Bangladesh, India, Pakistan and Sri Lanka.

I. Funding Opportunity Description

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation. Funding for this competition is being provided from FY–2004/FY–2005 Economic Support Funds (ESF) transferred to the Bureau of Educational and Cultural Affairs for obligation.

Purpose: ECA seeks proposals that will address one or more of four pillars in the Department's strategy for working with South Asia: education, democracy, economic development, and conflict management. Proposals will be judged more competitive if they present convincingly innovative, short-term, high-impact project designs, as the Bureau seeks new, expeditious and

potentially more effective ways to engage relevant audiences for these themes in the focal countries. Proposals should provide for travel between the U.S. and South Asia and for activities which will promote collaboration in planning and implementing projects of common interest. Proposals should target groups focused on youth, including teachers, parents, religious and community leaders and/or other mentors. They should also reflect an understanding of the related work of various international agencies (*e.g.*, U.S. Agency for International Development, World Bank, development foundations) so that the new projects complement, but do not duplicate, other programs. Proposals for countries and for themes other than those listed here will not be eligible for consideration and will be declared technically ineligible. No guarantee is made or implied that grants will be awarded in all categories.

Themes:

• *Innovation in education:* Projects might include the development of curricula, classroom pedagogy, parent/teacher/student associations, or the training of teachers and administrators to fit the needs of target schools and communities. Target schools may be public and/or publicly-sanctioned religious schools. Of particular interest would be schools or activities that focus on female students, as would projects that promote student problem solving and critical thinking skills with an interactive pedagogy. Special attention might be given to preparing students for employment or for citizenship roles. Literacy projects for girls, their mothers and/or unemployed youth plus projects that seek to develop and disseminate student-focused material in local languages on citizenship and civic issues would also be of interest.

• *Democracy enhancement:* Projects should promote youth awareness of and involvement in civic and democratic processes, including respect for intellectual freedom, tolerance of diversity, accountability of government, human rights, and inclusiveness of women and minorities. Small grants to community-based NGOs to promote grassroots democracy, civic education projects, and/or community health and development projects with a civic education component will be considered.

• *Economic skills promotion:* Projects should encourage and help youth develop skills for employment, entrepreneurship, intelligent economic decisionmaking, and business management. Integration of women and unemployed youth into local economies and regional economic cooperation is also of interest.

• *Conflict prevention, mitigation, reconciliation:* Projects should bring together young people from divided communities in countries and/or regions experiencing civil and communal conflict. Small-scale projects involving mock legislatures, volunteerism, student camps, mediation training, civil society efforts or other projects that promote dialogue among groups in conflict and coalitions among divided communities are of interest.

Applicants should identify local organizations and individuals in the South Asian countries with which/whom they are proposing to collaborate and provide information regarding previous cooperative programming and/or contacts. Information about the counterpart organizations' activities and accomplishments should be included in the section on institutional capacity. Proposals must contain letters of commitment or support from the foreign country partner organizations, and these letters should be tailored to the project being proposed.

Strong proposals usually have the following characteristics:

• A demonstrable track record by the applicant of working in the proposed issue area and countries;

• Experienced staff with language facility, where needed, and a commitment to monitor projects locally to ensure implementation;

• A clear, convincing implementation plan showing how substantive results will be achieved as a result of the activities funded by the grant; and

• A plan that outlines activities that will take place after the ECA grant concludes (follow-on).

The proposal narrative should clearly state the applicant's commitment to consult closely with the Public Affairs Section, and when required with other officers, at the U.S. Embassy in the focal countries. Applicants are encouraged to consult with U.S. Public Affairs Officers in those countries before submitting proposals. Proposal narratives should also state that all material developed for the project will acknowledge ECA Bureau funding for the program as well as a commitment to invite representatives of the Embassy and/or Consulate to participate in program sessions or site visits. Note that this will be a formal requirement in all final grant awards.

Suggested Program Designs

ECA-supported exchanges may include internships; study tours; short-term, non-technical experiential learning; and extended and intensive workshops and seminars taking place in the United States or overseas. Examples of possible program activities include:

1. A U.S.-based program that includes orientation to program purposes and to U.S. society, study tour/site visits, professional internships/placements, interaction and dialogue, experiential training, and action plan development.

2. Capacity-building and training-of-trainer (TOT) workshops to help participants identify priorities, create work plans, strengthen professional and volunteer skills, share their experience with committed people within each country, and become active in a practical and valuable way.

3. Site visits and workshops by U.S. facilitators to monitor projects in the region and to provide additional consultation and training as needed.

Activities Ineligible for Support

The Office does not support proposals limited to conferences or seminars (*i.e.*, one-to-fourteen-day programs with plenary sessions, main speakers, panels, and a passive audience). It will support conferences only when they are an integral component of a larger project that is receiving ECA funding from this competition. No funding is available exclusively to send U.S. citizens to conferences or conference-type seminars overseas; nor is funding available for bringing foreign nationals to conferences or to routine professional association meetings in the United States. The Office of Citizen Exchanges does not support academic research or faculty or student fellowships.

Participant Selection: The winning applicants MUST consult closely with officers in the Public Affairs Sections of U.S. Embassies, as well as the ECA Office of Citizen Exchanges, during program implementation. Embassy officers must concur in the selection of all participants nominated for the program.

Security Considerations: Proposals that include work in or with Afghanistan or Pakistan should reflect an awareness of security conditions there and should demonstrate willingness to work closely with the U.S. Embassies in Kabul or Islamabad to schedule grant activities in accordance with mission security guidelines. All travel to Afghanistan or Pakistan by U.S. participants in this program must be cleared in advance with the U.S. Embassies in Kabul or Islamabad and must be performed in accordance with mission requirements. Itineraries, details of local transportation and housing, and names of visitors will be submitted in advance for mission approval.

Once projects are funded, ECA will work with the grantees to solicit more detailed information on the needs and interests of individual participants.

II. Award Information

Type of Award: Grant.
Fiscal Year Funds: FY04–05.
Approximate Total Funding: $800,000.
Approximate Number of Awards: Four to five.
Approximate Average Award: $170,000.
Floor of Award Range: $ 55,000.
Ceiling of Award Range: $200,000.
Anticipated Award Date: Pending availability of funds, December 21, 2004.
Anticipated Project Completion Date: While ECA is most interested in projects that can be completed expeditiously, projects extending to December 31, 2006, will be considered.

III. Eligibility Information

III.1. Eligible applicants: Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs, and amount of cost sharing offered will be one criterion in evaluating grant proposals.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, grantees must maintain written records to support all costs which are claimed as contributions, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event the grantee does not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements: Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to $60,000.

IV. Application and Submission Information

Note: Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information To Request an Application Package: Please contact the Office of Citizen Exchanges, ECA/PE/C/NEAAF, Room 216, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, Attention: South Asia Professional Exchanges Program, telephone (202) 619–5320, fax number (202) 619–4350, to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/PE/C/NEAAF–05–02 and program title located at the top of this announcement when making your request.

The Solicitation Package contains the Proposal Submission Instructions (PSI) which include required application forms and standard guidelines for proposal preparation.

IV.2. To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/rfgps/menu.htm.* Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package. The original and ten copies of the application should be sent per the instructions under IV.3e. "Submission Dates and Times section" below.

IV.3a. Applicants are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424, "Application for Federal Assistance," which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application. If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa: The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs is the official program sponsor of the exchange program covered by this RFGP, and an employee of the Bureau will be the "Responsible Officer" for the program under the terms of 22 CFR part 62, which covers the administration of the Exchange Visitor Program (J visa program). Under the terms of 22 CFR part 62, organizations receiving grants under this RFGP will be third parties "cooperating with or assisting the sponsor in the conduct of the sponsor's program." The actions of grantee program organizations shall be "imputed to the sponsor in evaluating the sponsor's compliance with" 22 CFR part 62. Therefore, the Bureau expects that any organization receiving a grant under this competition will render all assistance necessary to enable the Bureau to fully comply with 22 CFR part 62 *et seq.*

The Bureau of Educational and Cultural Affairs places great emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantee program organizations and program participants to all regulations governing the J visa program status. Therefore, proposals should *explicitly state in writing* that the applicant is prepared to assist the Bureau in meeting all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR part 62. If your organization has experience as a designated Exchange Visitor Program Sponsor, the proposal should describe your record of compliance with 22 CFR part 62 *et seq.*, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of

forms, recordkeeping, reporting and other requirements.

The Office of Citizen Exchanges of ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD—SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 401–9810, FAX: (202) 401–9809.

IV.3d.2. Diversity, Freedom and Democracy Guidelines: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to, ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation: Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other data collection techniques plus a description of a methodology to link outcomes to original project objectives and to project activities. The Bureau expects that the grantee will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and objectives at the outset of a program. Your evaluation plan should include a description of project objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that objectives are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the program goals described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes. Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes*, in contrast, represent specific results a project is intended to achieve and are usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but primary attention should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. *Participant satisfaction* with the program and exchange experience.

2. *Participant learning*, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) knowledge and mutual understanding.

3. *Participant behavior*, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. *Institutional changes*, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.*, surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. Awards may not exceed $200,000. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the program include the following:

(1) Travel. International and domestic airfare (per the "Fly America Act"), ground transportation, and visas for U.S. participants. (J–1 visas for ECA-supported participants from South Asia to travel to the U.S. are issued at no charge.)

(2) Per Diem. For U.S.-based programming, organizations should use the published Federal per diem rates for individual U.S. cities. Domestic per diem rates may be accessed at: *http://policyworks.gov/org/main/mt/homepage/mtt/perdiem/perd03d.html.* For activities in South Asia, ECA requests applicants to budget realistic costs that reflect the local economy and never exceed Federal per diem rates. Foreign per diem rates can be accessed at: *http://www.state.gov/m/a/als/prdm/html.*

(3) Interpreters. For U.S.-based activities, ECA strongly encourages applicants to hire their own locally-

based interpreters. However, applicants may ask ECA to assign U.S. Department of State interpreters, which will decrease the amount of the award. Typically, one interpreter is provided for every four visitors that require interpreting. When an applicant proposes to use State Department interpreters, the following expenses should be included in the budget: Published Federal per diem rates (both "lodging" and "M&IE"; "home-program-home" transportation in the amount of $400 per interpreter; reimbursement for taxi fares; and cell phone usage at $10 per week. Salary expenses for State Department interpreters will be covered by the Bureau and should not be part of an applicant's proposed budget. Bureau funds cannot support interpreters who accompany delegations from their home country or travel internationally.

4. Book and Cultural Allowances. Foreign participants are entitled to a one-time cultural allowance of $150 per person, plus a book allowance of $50. Interpreters should be reimbursed up to $150 for expenses when they escort participants to cultural events. U.S. program staff, trainers or participants are not eligible to receive these benefits.

5. Consultants. Consultants may be used to provide specialized expertise or to make presentations. Honoraria rates should not exceed $250 per day. Organizations are encouraged to cost-share rates that would exceed that figure. Subcontracting organizations may also be employed, in which case the written agreement between the prospective grantee and subcontractor should be included in the proposal. Such subcontracts should detail the division of responsibilities and proposed costs, and subcontracts should be itemized in the budget.

6. Room rental should not exceed $250 per day, or any excess should be cost shared.

7. Materials development. Proposals may contain costs to purchase, develop and translate materials for participants. ECA strongly discourages the use of automatic translation software for the preparation of training materials or any information distributed to the group of participants or network of organizations. Costs for high quality translation of materials should be anticipated and included in the budget. Grantee organizations should expect to submit a copy of all program materials to ECA, and ECA support should be acknowledged on all materials developed with its funding.

8. Equipment. Proposals may include limited costs to purchase equipment for South Asia-based programming such as computers and fax machines, but equipment costs should be kept to a minimum. Costs for furniture are not allowed.

9. Working meal. Only one working meal may be provided during the program. Per capita costs may not exceed $8 for a lunch and $20 for a dinner, excluding room rental, and lower costs are preferred. The number of invited guests may not exceed participants by more than a factor of two-to-one. Interpreters must be included as participants.

10. Return travel allowance. A return travel allowance of $70 for each foreign participant may be included in the budget. This allowance may be used for incidental expenses incurred during international travel.

11. Health Insurance. Foreign participants will be covered during their participation in the program by the ECA-sponsored Accident and Sickness Program for Exchanges (ASPE), for which the grantee must enroll them. Details of that policy can be provided by the contact officers identified in this solicitation. The premium is paid by ECA and should not be included in the grant proposal budget. However, applicants are permitted to include costs for travel insurance for U.S. participants in the budget.

12. Wire transfer fees. When necessary, applicants may include costs to transfer funds to partner organizations overseas. Grantees are urged to research applicable taxes that may be imposed on these transfers by host governments.

13. In-country travel costs for visa processing purposes. Given the requirements associated with obtaining J–1 visas for ECA-supported participants, applicants should include costs for participant and/or in-country partner travel to U.S. embassies or consulates for these purposes. *E.g.*, Afghan participants may have to travel to Islamabad more than once to be interviewed and to pick up their visas.

14. Administrative Costs. Costs necessary for the effective administration of the program may include salaries for grantee organization employees, benefits, and other direct and indirect costs per detailed instructions in the Application Package. While there is no rigid ratio of administrative to program costs, proposals in which the administrative costs do not exceed 25% of the total requested ECA grant funds will be rated more highly on cost effectiveness (*See* Review Criterion #10.). Proposals should show strong administrative cost-sharing contributions from the applicant, the in-country partner and other sources.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Submission Dates and Times:

Application Deadline Date: October 7, 2004.

Explanation of Deadlines: In light of recent events and heightened security measures, proposal submissions must be sent via a nationally recognized overnight delivery service (*i.e.*, DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, *etc.*) and be shipped no later than the above deadline. The delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. ECA will *not* notify you upon receipt of application. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered. Applications may not be submitted electronically at this time.

Applicants must follow all instructions in the Solicitation Package.

Important Note: When preparing your submission please make sure to include one extra copy of the completed SF–424 Application For Federal Assistance form and place it in an envelope addressed to "ECA/EX/PM".

The original and ten copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs,Ref.: ECA/PE/C/NEAAF–05–02, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

Applicants must also submit the "Executive Summary" and "Proposal

Narrative" sections of the proposal in text (.txt) format on a PC-formatted disk. The Bureau will provide these files electronically to the appropriate Public Affairs Section(s) at the U.S. embassy(ies) for its(their) review.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. The program office, as well as the Public Diplomacy section overseas, where appropriate, will review all eligible proposals. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for grants resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of the program idea:* Proposals should exhibit originality, substance, precision, and relevance to the purposes stated in this Request for Grant Proposals. Note the call for innovative, short-term, high-impact designs.

2. *Program planning:* Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity over a progressive time line. Agenda and plan should adhere to the program overview and guidelines described above.

3. *Ability to achieve program objectives:* Objectives should be clearly stated (see section on monitoring and evaluation above) in terms that allow linkage with program activities.

4. *Multiplier effect/impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

5. *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials and follow-up activities).

6. *Institutional Capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals.

7. *Institution's Record:* Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grants Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

8. *Follow-on Activities:* Proposals should provide a plan for continued follow-on activity (without Bureau support) ensuring that ECA-supported programs are not isolated events.

9. *Project Evaluation:* Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. ECA recommends submission of draft survey questionnaires or other data collection techniques plus description of a methodology to use to link outcomes to original project objectives and project activities. ECA also recommends employment of an expert, independent evaluator and final impact evaluation conducted six months after the end of other program activities.

Although some exchange project objectives may be difficult to quantify, ECA urges applicants to identify indicators and observational techniques to associate with all objectives so that program progress and outcome can be objectively reported. Overall, an evaluation plan will be judged more satisfactory the more that it specifies (a) a distinct population with which to work, (b) a manageable set of "smart" objectives on a time line for that population, (c) clear descriptions of performance indicators for each objective, (d) measurement tools for collecting data, (e) a methodology for aggregating observations, and (f) inference strategies for interpreting data.

10. *Cost-effectiveness:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate.

11. *Cost-sharing:* Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding and in-kind contributions.

12. *Value to U.S.-Partner Country Relations:* Proposed projects should receive positive assessments by the U.S. Department of State's geographic area desk and overseas officers of program need, potential impact, and significance in the partner country(ies).

VI. Award Administration Information

VI.1. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The AAD will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2. Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions."

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information:

http://www.whitehouse.gov/omb/grants;
http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI.

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus one copy of the following reports:

a. A final program that includes the overall program evaluation and a final

financial report no more than 90 days after the expiration of the award;

b. Quarterly financial reports; and

c. Program reports after each major phase of activity, *e.g.*, after each international travel phase.

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. Please refer to Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VI.4. Program Data Requirements

Organizations awarded grants will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as requested. As a minimum, the data must include the following:

(a) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the grant.

(b) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in-country and U.S. activities must be received by the ECA Program Officer at least three work days prior to the official opening of the activity.

VII. Agency Contacts

For questions about this announcement, contact: Katherine Van de Vate ((202) 619–5320, *vandevatek@state.gov*) or Thomas Johnston ((202) 619–5325, *JohnstonTJ@state.gov*), room 216, Office of Citizen Exchanges, ECA/PE/C/NEAAF, U.S. Department of State, SA–44, 301 Fourth Street, SW., Washington, DC 20547. All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/PE/C/NEAAF–05–02.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Notification: Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal ECA Bureau procedures.

Dated: August 6, 2004.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 04–18456 Filed 8–11–04; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee; Public Comments for Multilateral Negotiations in the World Trade Organization on Expansion of the List of Pharmaceutical Products Receiving Zero Duties

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: The Trade Policy Staff Committee (TPSC) is requesting written public comments with respect to the expansion of the list of pharmaceuticals subject to reciprocal duty elimination by certain members of the World Trade Organization (WTO). The specific information being sought is described in the background section below.

DATES: Public comments are due by noon, September 17, 2004.

ADDRESSES: Office of the U.S. Trade Representative, 600 17th Street, NW., Washington, DC 20508. Submissions by electronic mail: *FR0435@ustr.gov*. Submissions by facsimile: Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–6143.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning public comments, contact Gloria Blue, Executive Secretary, TPSC, Office of the USTR, 1724 F Street, NW., Washington, DC 20508, telephone (202) 395–3475. Questions concerning the expansion of the list of pharmaceutical products receiving zero duties should be addressed to Sarah Bovim or Jean Janicke, Director, Market Access, USTR (202) 395–4994.

SUPPLEMENTARY INFORMATION: The Chairman of the TPSC invites written comments from the public on the expansion of the list of pharmaceutical products receiving duty-free treatment from certain members of the World Trade Organization (WTO), specifically additions to the lists of pharmaceutical active ingredients; prefixes and suffixes that could be associated with an active ingredient in order to designate its salt, ester or hydrate form; or chemical intermediates intended for the manufacture of pharmaceutical active ingredients. Negotiations will begin in 2004 in the WTO with a view to adding new pharmaceuticals to the zero duty list. Any amendments to the list of pharmaceuticals will be subject to approval by all participants in the negotiations. A copy of the initial list of proposed items is available on the USTR Web site at: *http://www.ustr.gov*.

1. Background Information

During the Uruguay Round of multilateral trade negotiations, the United States and 16 trading partners agreed to the reciprocal elimination of duties on approximately 7,000 pharmaceutical products and chemical intermediates on January 1, 1995. Participants also agreed to periodically update the zero duty list of pharmaceuticals. As a result of multilateral negotiations in the WTO during 1996 and again in 1998, the United States and other participants in the negotiations eliminated duties on an additional 750 international nonproprietary names (INNs) and chemical intermediates on April 1, 1997, and on an additional 630 such products on July 1, 1999.

The Pharmaceutical Appendix to the Harmonized Tariff Schedule of the United States (HTSUS) enumerates the products and chemical intermediates that are eligible to enter free of duty as a result of the Uruguay Round zero for zero agreement on pharmaceuticals and the subsequent updates by WTO members. The HTSUS can be purchased from the United States Government Printing Office. An electronic version of the HTSUS can be found at *http://www.usitc.gov*. The Pharmaceutical Appendix of the HTSUS consists of

three tables. Table 1 lists active pharmaceutical ingredients and dosage-form products by their International Nonproprietary Names (INNs) from the World Health Organization (WHO).

Table 1 currently includes INNs from WHO lists 1–78. Prefixes and suffixes that could be associated with the INNs in Table 1, potentially resulting in multiple permutations in derivatives, are enumerated in Table 2. Chemical intermediates intended for the manufacture of pharmaceuticals are listed in Table 3. The interagency TPSC committee, led by USTR and with input from appropriate industry association and private sector advisory groups, is in the process of preparing negotiating positions. Comments are requested for pharmaceutical items which would be in the interest of the United States to add to the existing WTO zero for zero agreement.

Negotiators will be reviewing the INNs on the most recent WHO lists (*i.e.*, lists 79–90) in this latest review cycle. Comments pertaining to the pharmaceutical active ingredients covered by these lists need only provide the INN name and reference the appropriate WHO list. Otherwise, the following information must be supplied for each pharmaceutical active ingredient or chemical intermediate to provide the technical basis for reviewing the submissions: (1) The precise chemical name; (2) the Chemical Abstracts Service (CAS) registry number; (3) a diagram of the molecular structure; and (4) the six-digit Harmonized System classification number. Submissions of chemical intermediates also must provide the INN and chemical name of the active ingredient into which it is incorporated, the CAS number of this active ingredient, and a diagram of the molecular structure of this active ingredient. A suggested format for presenting this information is presented below. In addition, submissions of chemical intermediates must demonstrate that the product meets the following conditions: (1) The chemical is a sole-pharmaceutical use intermediate; (2) some portion of the intermediate is incorporated in the final active ingredient molecule, and (3) the intermediate is used in producing an active ingredient that has reached at least Phase III of clinical trials of the Food and Drug Administration (or other national equivalent). Comments pertaining to the additions to the list of prefixes or suffixes for salt, ester or hydrate forms of an INN active ingredient should state a rationale for the nomination. Only comments containing all of the above information will be considered in developing U.S. positions for the negotiations.

2. Requirements for Submissions

In order to facilitate prompt processing of submissions, USTR strongly urges and prefers electronic (e-mail) submissions in response to this notice.

Persons making submissions by e-mail should use the following subject line: "Expansion of the List of Pharmaceutical Products Receiving Zero Duties" followed by "Written Comments." Documents should be submitted as either WordPerfect, MSWord, or text (.txt) files. Supporting documentation submitted as spreadsheets are acceptable as Quattro Pro or Excel. More detailed information regarding the content of the submissions is listed below.

For any document containing business confidential information submitted electronically, the file name of the business confidential version should begin with the characters "BC-", and the file name of the public version should begin with the characters "P-". The "P-" or "BC-" should be followed by the name of the submitter. Persons who make submissions by e-mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. To the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Written comments submitted in response to this request will be placed in a file open to public inspection pursuant to 15 *CFR* 2003.5, except business confidential information exempt from public inspection in accordance with 15 *CFR* 2003.6. Business confidential information submitted in accordance with 15 *CFR* 2003.6 must be clearly marked "Business Confidential" at the top of each page, including any cover letter or cover page, and must be accompanied by a nonconfidential summary of the confidential information. All public documents and nonconfidential summaries shall be available for public inspection in the USTR Reading Room. The USTR Reading Room is open to the public, by appointment only, from 10 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday. An appointment to review the file must be scheduled at least 48 hours in advance and may be made by calling (202) 395–6186.

General information concerning the Office of the United States Trade Representative may be obtained by accessing its Internet Web site (*http://www.ustr.gov*).

Carmen Suro-Bredie,

Chair, Trade Policy Staff Committee.

Suggested format for submissions:

HS code (6-digit)	CAS number	Chemical name (*e.g.*, chemical abstracts index name)
Molecular structure:		

For all chemical intermediates, the following information is provided on the pharmaceutical active ingredient into which the intermediate is incorporated:

INN of active ingredient	CAS number of active ingredient	Chemical name of active ingredient
Molecular structure of active ingredient:		

[FR Doc. 04–18424 Filed 8–11–04; 8:45 am]
BILLING CODE 3190–WH–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS–245]

WTO Dispute Settlement Proceeding Regarding Japanese Measures Affecting the Importation of Apples

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative ("USTR") is providing notice that on July 30, 2004, at the request of the United States, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) established a dispute settlement panel under the Marrakesh Agreement Establishing the WTO to examine whether Japan has implemented the recommendations and rulings of the DSB in a dispute involving Japanese phytosanitary measures restricting the importation of U.S. apples. Japan justifies the measures as relating to the plant disease fire blight and the fire blight-causing organism, *Erwinia amylovora*. On December 10, 2003, the DSB adopted the findings of the panel and Appellate Body in this proceeding, which found that Japan's apple import regime was maintained in breach of various provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). Japan issued revised measures on June 30, 2004 in response to the DSB's recommendations and rulings. The United States subsequently requested the establishment of the dispute settlement panel because it believes that Japan's revised measures do not comply with the DSB's recommendations and rulings or the SPS Agreement. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before September 1, 2004 to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted (i) electronically, to *FR0438@ustr.gov*, Attn: "Japan Apples" in the subject line, or (ii) by fax, to Sandy McKinzy at (202) 395–3640, with a confirmation copy sent electronically to the email address above.

FOR FURTHER INFORMATION CONTACT: Jay T. Taylor, Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–3150.

SUPPLEMENTARY INFORMATION: Section 127(b) of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. § 3537(b)(1)) requires that notice and opportunity for comment be provided after the United States submits or receives a request for the establishment of a WTO dispute settlement panel. If a dispute settlement panel is established pursuant to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within approximately three months of the date it is established.

Prior WTO Proceedings

On December 10, 2003, the WTO DSB adopted the reports of a dispute settlement panel and the WTO Appellate Body in a dispute brought by the United States challenging Japanese phytosanitary restrictions on the import of U.S. apples in connection with fire blight or the fire blight-causing organism, *Erwinia amylovora*. The panel found, and the Appellate Body confirmed, that Japan's restrictions were not consistent with its obligations under the SPS Agreement. The DSB recommended that Japan revise its measure accordingly. The dispute settlement panel and Appellate Body reports are publicly available in the USTR reading room and on the WTO Web site *http://www.wto.org*.

Article 21.5 Proceeding

The United States and Japan agreed that Japan would have until June 30, 2004 as the reasonable period of time to implement the DSB's recommendations and rulings. The United States and Japan met several times during that period in an attempt to reach an agreement regarding Japan's restrictions on U.S. apples, but were unable to agree on a satisfactory result. Japan issued revised measures on June 30, which the United States believes fail to comply with the DSB's recommendations and rulings and the SPS Agreement. Accordingly, the United States requested the establishment of an Article 21.5 compliance panel to determine the WTO-consistency of Japan's revised measures. The DSB established the panel on July 30, 2004.

The European Communities, New Zealand, Chinese Taipei, and Australia have indicated their interest to participate in the dispute as third parties.

Japan's new measures retain almost all of the phytosanitary restrictions of the original measure, which was found by the Appellate Body and Panel to be inconsistent with Japan's obligations under the SPS Agreement. The restrictions include: the prohibition of imported apples other than those produced in designated orchards in the U.S. States of Washington and Oregon; the prohibition of imported apples from orchards in which any fire blight is detected; the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected in a "buffer zone" surrounding the orchard; the requirement that export orchards be inspected for the presence of fire blight for purposes of applying the above-mentioned prohibitions; a post-harvest surface treatment of exported apples with chlorine; production requirements, such as chlorine treatment of the interior of the packing facility; post-harvest separation of apples for export to Japan from those apples for other destinations; a requirement that U.S. plant protection officials certify or declare that the apples are free of quarantine pests, not infected/infested with fire blight, and have been treated with chlorine; and a requirement that Japanese officials confirm that the certification, orchard designation and chlorine treatment have been properly administered and inspect the disinfestation and packing facilities. The United States believes that Japan's revised measures are inconsistent with Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 6.1 and 6.2 of the SPS Agreement, Article XI of the *General Agreement on Tariffs and Trade 1994* and Article 4.2 of the *Agreement on Agriculture*.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons submitting comments may either send one copy by fax to Sandy McKinzy at (202) 395–3640, or transmit a copy electronically to *FR0438@ustr.gov*, with "Japan Apples (DS245)" in the subject line. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to the electronic mail address listed above.

USTR encourages the submission of documents in Adobe PDF format, as attachments to an electronic mail. Interested persons who make submissions by electronic mail should not provide separate cover letters; information that might appear in a cover

letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter.

Confidential business information must be clearly designated as such and the submission must be marked "BUSINESS CONFIDENTIAL" at the top and bottom of the cover page and each succeeding page of the submission.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitting person believes that information or advice may qualify as such, the submitting person—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as "SUBMITTED IN CONFIDENCE" at the top and bottom of each page of the cover page and each succeeding page; and

(3) Is encouraged to provide a non-confidential summary of the information or advice.

Pursuant to section 127(e) of the URAA (19 U.S.C. 3537(e)), USTR will maintain a file on this dispute settlement proceeding, accessible to the public, in the USTR Reading Room, which is located at 1724 F Street, NW., Washington, DC 20508. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened, the U.S. submissions to that panel, the submissions, or non-confidential summaries of submissions, to the panel received from other participants in the dispute, as well as the report of the panel; and, if applicable, the report of the Appellate Body. An appointment to review the public file (Docket No. WT/DS–245, Japan—Apples) may be made by calling the USTR Reading Room at (202) 395–6186. The USTR Reading Room is open to the public from 9:30 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday.

Daniel E. Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 04–18457 Filed 8–11–04; 8:45 am]

BILLING CODE 3190–W4–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending July 30, 2004

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. sections 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2004–18732.
Date Filed: July 26, 2004.
Parties: Members of the International Air Transport Association.
Subject: PTC12 USA–EUR Fares 0091 dated 27 July 2004. Resolution 015h—USA Add-ons between USA and UK. Intended effective date: 1 October 2004.

Docket Number: OST–2004–18762.
Date Filed: July 29, 2004.
Parties: Members of the International Air Transport Association.
Subject: PTC COMP 1165 dated 30 July 2004. Composite Expedited Resolutions 024d and 024e r1–r2. Intended effective date: 1 September 2004.

Docket Number: OST–2004–18763.
Date Filed: July 29, 2004.
Parties: Members of the International Air Transport Association.
Subject: PTC COMP 1166 dated 30 July 2004. Composite Expedited Resolution 002tt r4. Intended effective date: 1 November 2004.

Docket Number: OST–2004–18767.
Date Filed: July 30, 2004.
Parties: Members of the International Air Transport Association.
Subject: PTC2 EUR 0576 dated 30 July 2004. Mail Vote 399—Resolution 010q. TC2 Within Europe, Europe-Africa, Europe-Middle East Special. Passenger Amending Resolution from Algeria r1. Intended effective date: 15 August 2004.

Docket Number: OST–2004–18768.
Date Filed: July 30, 2004.
Parties: Members of the International Air Transport Association.
Subject: PTC2 EUR–AFR 0207 dated 30 July 2004. Mail Vote 399—Resolution 010q. TC2 Within Europe, Europe-Africa, Europe-Middle East Special. Passenger Amending Resolution from Algeria r1. Intended effective date 15 August 2004.

Docket Number: OST–2004–18769.
Date Filed: July 30, 2004.
Parties: Members of the International Air Transport Association.
Subject: PTC2 EUR–ME 0190 dated 30 July 2004. Mail Vote 399—Resolution 010q. TC2 Within Europe, Europe-Africa, Europe-Middle East Special. Passenger Amending Resolution from Algeria r1. Intended effective date: 15 August 2004.

Andrea M. Jenkins,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 04–18484 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Addendum to Preparation of an Environmental Impact Statement for a Proposed Transit Improvement Project in Branson, MO

AGENCY: Federal Transit Administration (FTA), U.S. Department of Transportation (DOT).

ACTION: Notice of revised public meeting date supporting the notice of intent to prepare an environmental impact statement

SUMMARY: FTA is issuing this notice to advise the public and agencies that the open-house public scoping meeting for the Environmental Impact Statement (EIS) on a proposed transit improvement project in Branson, Missouri has been rescheduled.

DATES: *Public Scoping Meeting:* A public open-house meeting is scheduled from 4 to 7 pm on Monday, August 30, 2004, at the Branson City Hall Municipal Courtroom (110 West Maddux Street, Branson, MO) in lieu of the originally scheduled June 29 open-house meeting. (The new meeting date will be advertised locally.) Oral and written comments may be made at this session. Project staff from the City of Branson will be available for informational discussion and to answer questions. The following information will be presented at the Open-house meeting: The study-area boundary; the study schedule; the public involvement plan; the problem statement; the project purpose and need; the study goals and objectives; effectiveness measures, as well as the alternatives currently proposed to be considered in the study. Input will be solicited to focus the environmental investigations. The meeting location is accessible to individuals with disabilities. Individuals with special needs should contact Cheryl Ford, Engineering Department; City of Branson, Missouri at (417) 337–8559. *Comment Due Date:* Written comments on the scope of the EIS should be sent to the Branson City Engineer as indicated in **ADDRESSES** below by September 30, 2004.

ADDRESSES: Written comments on the project scope should be forwarded to: Joni Roeseler, Project Manager, Federal Transit Administration, Region VII, 901 Locust Street, Room 404, Kansas City, Missouri 64106; Telephone: (816) 329–3936; e-mail: *joan.roeseler@fta.dot.gov;* or: David Miller, City Engineer, City of Branson, 110 West Maddux Street, Suite 310, Branson, Missouri 65616; Telephone: (417) 337–8559; e-mail: *dmiller@cityofbranson.org.*

FOR FURTHER INFORMATION CONTACT: If additional information is needed, contact the FTA or the City of Branson personnel identified in **ADDRESSES** above. You can also visit the City of Branson Web site at *http://www.branson.com* where a project page will be established by the time of the open-house meeting.

Scoping Package: An information packet, referred to as the Scoping Booklet, will be distributed to interested individuals upon request and will be available at the meeting. (Copies of the Scoping Booklet have also been distributed to resource agencies.) Others may request the Scoping Booklet by contacting the Branson City Engineer as indicated in **ADDRESSES** above. Also contact the Branson City Engineer if you wish to be placed on the mailing list to receive additional information as the study develops.

SUPPLEMENTARY INFORMATION:

I. Scoping

FTA, in cooperation with the City of Branson and the Missouri department of Transportation (MoDOT), will prepare an EIS to address transit improvements in the City of Branson, Missouri. The EIS will evaluate all reasonable alternatives identified during the scoping process, as required by the National Environmental Policy Act (NEPA) and its implementing regulations. This NEPA alternatives analysis is expected to result in the selection of a locally preferred alternative, which may include a fixed guideway transit improvement.

II. Description of Corridor and Transportation Needs

Branson, Missouri, with a populations of about 6,000 accommodates over seven million visitors a year. These visitors make trips to multiple venues (theaters, lodging, restaurants, etc.), which are concentrated along State Route 76. This roadway, referred to as "the Strip," offers a single lane of vehicular flow in each direction divided by a two-way left-turn lane. The roadway is paralleled by narrow paved shoulders used as sidewalks and by multiple overhead utilities situated adjacent to intensive development. Only a handful of signalized intersections exist along the strip, complicating the ability of pedestrians to get across the street. Options are limited to further expand the roadway network to address the considerable traffic congestion that remains on the Strip from single-occupant autos and tour buses. No public transit service is currently available in the corridor. The problem is expected to grow worse over time as venues continue to grow in popularity and as more venues are added.

Transit needs will be evaluated in this corridor to address the congestion problems along the Strip. The study area involves a roughly ten-mile-long corridor. It is generally bounded: on the north by the Red Route west of Roark Creek and the Missouri and North Arkansas railroad east of Roark Creek; on the east by the rail line; on the south by parkland paralleling Lake Taneycomo and the Yellow Route; and on the west by the Taney/Stone County line. Alternatives to be considered will include: (1) Taking no action (no-build); (2) transportation systems management; (3) fixed guideway transit (including elevated options with park-and-ride facilities and feeder bus/shuttle vans); and (4) other alternatives discovered during the scoping process.

III. Probable Effects and Potential Impacts for Analysis

The transportation, social, economic, and environmental effects of the alternatives will be evaluated during the project study. The impact areas to be addressed include: land use effects; visual/aesthetic effects; community, business and economic impacts; traffic and parking; public safety; utilities effects; relocations; water quality; flood plains; natural systems impacts; air quality; noise and vibration; energy impacts; and cultural and historic resources. Potential environmental justice issues and financial considerations will also be addressed along with secondary, cumulative and construction impacts.

IV. FTA Procedures

In accordance with FTA policy, all federal laws, regulations, and executive orders affecting project development including but not limited to the regulations of the Council on Environmental Quality and FTA regulations implementing NEPA (40 CFR parts 1500–1508, and 23 CFR part 771), the Clean Air Act, Section 404 of the Clean Water Act, Executive Order 12898 regarding environmental justice, the National Historic Preservation Act, the Endangered Species Act, and Section 4(f) of the DOT Act, will be addressed. In addition, the FTA New Starts regulation (49 CFR part 611) will be applied, which requires the submission of specific information to FTA from the grant applicant to support an FTA decision on initiating preliminary engineering.

Comments and suggestions are invited from all interested parties to assist in addressing the full range of alternatives and to identify any significant potential project impacts. In addition, a public hearing will be held after the draft EIS has been circulated for public and agency review and comment. Comments or questions concerning the proposed action and the scope of the EIS should be directed to the FTA as described in **ADDRESSES** above.

Issued on August 6, 2004.

Mokhtee Ahmad,

FTA Regional Administrator.

[FR Doc. 04–18486 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–57–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2004–18849]

Notice of Receipt of Petition for Decision That Nonconforming 1994–1997 Right Hand Drive (RHD) Honda Accord Sedan and Wagon Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 1994–1997 Right Hand Drive (RHD) Honda Accord sedan and wagon passenger cars are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1994–1997 RHD Honda Accord sedans and wagons that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is September 27, 2004.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW., Washington, DC 20590. (Docket hours are from 9 a.m. to 5 p.m.) Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202) 366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

American Auto Dream of Costa Mesa, California ("AAD") (Registered Importer 02–224) has petitioned NHTSA to decide whether 1994–1997 RHD Honda Accord sedans and wagons are eligible for importation into the United States. The vehicles that AAD believes are substantially similar are 1994–1997 left hand drive (LHD) Honda Accord sedans and wagons that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 1994–1997 RHD Honda Accord sedans and wagons to their U.S.-certified LHD counterparts (which the petitioner states are manufactured in the same plant and on the same assembly line), and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

AAD submitted information with its petition intended to demonstrate that non-U.S. certified 1994–1997 RHD Honda Accord sedans and wagons, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S.-certified LHD counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1994–1997 RHD Honda Accord sedans and wagons are identical to their U.S.-certified LHD counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic and Electric Brake Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 113 *Hood Latch System,* 114 *Theft Protection,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 208 *Occupant Crash Protection,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* and 302 *Flammability of Interior Materials.*

Additionally, the petitioner states that non-U.S. certified 1994–1997 RHD Honda Accord sedans and wagons comply with the Bumper Standard found in 49 CFR part 581.

Petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* (a) Substitution of a lens marked "Brake" for a lens with a noncomplying symbol on the brake failure indicator lamp; (b) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model headlamp assemblies, and (b) installation of front sidemarker lamp assemblies that incorporate side reflex reflectors.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Inscription of the required warning statement on the passenger side rearview mirror.

Standard No. 301 *Fuel System Integrity:* Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

The petitioner states that a vehicle identification number plate must be affixed to all non-U.S. certified 1994–1997 RHD Honda Accord sedans and wagons to meet the requirements of 49 CFR part 565.

The petitioner additionally states that all vehicles will be inspected prior to importation to assure compliance with the Theft Prevention Standard at 49 CFR part 541, and that vehicles will be modified, if necessary, to comply with that standard.

Interested persons are invited to submit comments on the petition described above. In addition, NHTSA specifically requests comments addressing the issue of whether an RHD vehicle can be properly considered "substantially similar" to an LHD vehicle of the same make, model, and model year.

While there is no specific prohibition on the importation of an RHD vehicle, our policy has been that such vehicles may not be imported under eligibility decisions that cover only the LHD version of the vehicle. We have taken this position because our experience has shown that the safety performance of an RHD vehicle is not necessarily the same as that of an apparently similar LHD vehicle that is offered for sale in this country. However, we will consider an RHD vehicle to be "substantially similar" to a U.S.-certified LHD vehicle (and therefore eligible for importation under a decision covering the LHD version) if the manufacturer advises us that the RHD vehicle would perform the same as the U.S.-certified LHD vehicle in dynamic crash tests. Absent such a showing, which indicates to us that the manufacturer has conducted a due care assessment of compliance of a RHD version with all applicable FMVSS, the RI must petition the agency under 49 CFR 593.5(2) to determine the vehicle eligible for importation. To be granted, the petition must demonstrate that the vehicle, when modified, would comply

with all applicable Federal motor vehicle safety standards, including those for which dynamic crash testing is prescribed.

By submitting the petition at issue, AAS is requesting that NHTSA reevaluate this policy for an RHD vehicle that is manufactured in the same plant, and on the same assembly line, as its U.S.-certified counterpart. In processing this petition, we have decided that a comment period of 45 days is necessary to afford interested parties an opportunity to respond to the issues that it raises. We are particularly interested in comments concerning the likelihood that the RHD vehicle at issue, which is assembled on the same assembly line as its U.S.-certified LHD counterpart, would, by virtue of that fact, perform the same as the U.S.-certified vehicle in dynamic crash tests as well as crash avoidance tests.

Comments should refer to the docket number and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW., Washington, DC 20590. (Docket hours are from 9 a.m. to 5 p.m.) It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 04–18483 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–59–U

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34526]

Union Pacific Railroad Company—Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company

The Burlington Northern and Santa Fe Railway Company (BNSF) has agreed to a modified trackage rights agreement governing Union Pacific Railroad Company's (UP) [1] overhead trackage rights over a BNSF line of railroad between BNSF milepost 1406.3 near Dover, ID, and BNSF milepost 1402.41 near Sandpoint, ID, including to ES 49+88.2, a total distance of approximately 5.24 miles.[2] The modified agreement will change the compensation and maintenance terms of an existing 1992 Agreement.

The transaction was scheduled to be consummated on July 30, 2004.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34526, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Robert T. Opal, General Commerce Counsel, 1400 Douglas Street, Stop 1580, Omaha, NE 68179.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: August 6, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–18447 Filed 8–11–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–307 (Sub-No. 5X)]

Wyoming and Colorado Railroad Company, Inc.—Abandonment Exemption—in Carbon County, WY

On July 23, 2004, Wyoming and Colorado Railroad Company, Inc. (WYCO) filed with the Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a 23.71-mile line of railroad between milepost 0.57, near Walcott and milepost 24.28, at Saratoga, in Carbon County, WY. The line traverses United States Postal Service Zip Codes 82331 and 82335 and includes no stations.

The line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by November 10, 2004.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,100 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than September 1, 2004. Each trail use request must be accompanied by a $200 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–307 (Sub-No. 5X) and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001, and (2) Karl Morell, Of Counsel, Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005. Replies to the WYCO petition are due on or before September 1, 2004.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and

[1] UP submitted, as Exhibit 2 to the notice of exemption, a draft agreement. On August 5, 2004, UP filed a copy of the final agreement, dated July 30, 2004, as executed by the parties.

[2] The trackage rights were originally exempted in *Union Pacific Railroad Company and Burlington Northern Railroad Company—Joint Relocation Project Exemption*, Finance Docket No. 32081 (ICC served July 2, 1992).

upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition.

The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 4, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–18150 Filed 8–11–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Funding Opportunity Title: Notice of Allocation Availability (NOAA) Inviting Applications for the CY 2005 Allocation Round of the New Markets Tax Credit Program

Announcement Type: Initial announcement of tax credit allocation availability.

Dates: Electronic applications must be received by 5 p.m. ET on October 6, 2004. Paper applications must be postmarked on or before October 6, 2004 and received by 5 p.m. ET on October 14, 2004 (see Section IV.D. of this NOAA for more details). Applications must meet all eligibility and other requirements and deadlines, as applicable, set forth in this NOAA. Allocation applicants that are not yet certified as community development entities (CDEs) must submit an application for certification as a CDE that is postmarked on or before September 8, 2004 and received by 5 p.m. ET on September 15, 2004 (see Section III. of this NOAA for more details).

Executive Summary: This NOAA is issued in connection with the calendar year 2005 tax credit allocation round of the New Markets Tax Credit (NMTC) Program, as authorized by Title I, subtitle C, section 121 of the Community Renewal Tax Relief Act of 2000 (the Act). Through the NMTC Program, the Community Development Financial Institutions Fund (the Fund) provides authority to CDEs to offer an incentive to investors in the form of a tax credit over seven years, which is expected to stimulate the provision of $15 billion in private investment capital that, in turn, will facilitate economic and community development in Low-Income Communities. In this NOAA, the Fund addresses specifically how an entity may apply to receive an allocation of NMTCs, the competitive procedure through which NMTC Allocations will be made, and the actions that will be taken to ensure that proper allocations are made to appropriate entities.

I. Allocation Availability Description

A. Programmatic Improvements

In the first two allocation rounds of the NMTC Program, the Fund received total allocation requests in excess of $56 billion when the total allocation authority available was $6 billion. In this NOAA, the Fund intends to target its resources by providing allocations first to those highly qualified applicants that have demonstrated the most compelling and innovative business strategies and/or have committed to achieving the most challenging impacts in Low-Income Communities. As further described in Section V. B of this NOAA, applicants must demonstrate that they are minimally qualified under each of the four review criteria (Business Strategy; Capitalization Strategy; Management Capacity and Community Impact) in order to be considered for an allocation. In addition, in prioritizing awards, the Fund will give greater weight to the elements contained in each applicant's Business Strategy and Community Impact sections. The Fund believes that this programmatic focus is warranted because it helps direct resources to CDEs that are pursuing innovative business strategies that are likely to result in significant and demonstrable community impact.

The Fund also has determined that, given the historical level of interest in the NMTC Program and the lower level of tax credit authority the Fund can allocate in 2005, it is prudent to set general limitations on the size of individual allocation amounts. As stated in Section II. A. of this NOAA, the Fund generally will not provide more than $150 million of allocation authority to any single applicant in this application round.

Finally, the Fund has modified certain eligibility requirements relating to prior Allocatees wishing to apply for an additional allocation in this CY 2005 allocation round. In the CY 2003–2004 allocation round, prior Allocatees had to demonstrate that at least 50 percent of their Qualified Equity Investments had been issued. In this CY 2005 allocation round, under certain circumstances, a prior Allocatee wishing to apply for an additional allocation will be permitted to use legally binding investor commitments as well as Qualified Equity Investments in order to meet the eligibility requirements. These requirements are more fully described in Section III. 2 of this NOAA.

B. Program Guidance and Regulations

This NOAA provides guidance for the application and allocation of NMTCs for the third round of the NMTC Program and should be read in conjunction with: (i) Guidance published by the Fund on how an entity may apply to become certified as a CDE (66 FR 65806, December 20, 2001); (ii) the temporary regulations issued by the Internal Revenue Service (26 CFR 1.45D–1T, published on December 26, 2001, and amended on March 11, 2004) and related guidance; and (iii) the application and related materials for this third NMTC Program allocation round. All such materials may be found on the Fund's Web site at *http://www.cdfifund.gov.* The Fund encourages applicants to review these documents. Capitalized terms used but not defined in this NOAA shall have the respective meanings assigned to them in the allocation application, the Act or the IRS temporary regulations.

II. Allocation Information

A. Allocation Amounts

The Fund expects that it may allocate to CDEs the authority to issue to their investors up to the aggregate amount of $2.0 billion in equity as to which NMTCs may be claimed, as permitted under IRC § 45D(f)(1)(C). The Fund anticipates that, under this NOAA, it will not issue more than $150 million in tax credit allocation authority per applicant. The Fund, in its sole discretion, reserves the right to allocate amounts in excess of or less than the anticipated maximum allocation amount if the Fund deems it appropriate. In order to receive an allocation in excess of $150 million, an applicant will likely need to demonstrate, for example, that: (i) No part of its strategy can be successfully implemented without an allocation in excess of $150 million; or (ii) its strategy will produce extraordinary community impact. The Fund reserves the right to allocate tax credit authority to any, all or none of the entities that submit an application in response to this NOAA, and in any amount it deems appropriate.

B. Types of Awards

NMTC Program awards are made in the form of tax credit authority.

C. Notice of Allocation and Allocation Agreement

Each Allocatee under this NOAA must sign a Notice of Allocation and an Allocation Agreement before the NMTC Allocation is effective. The Notice of Allocation and the Allocation Agreement contain the terms and conditions of the allocation. For further information, see Section VI. of this NOAA.

III. Eligibility

A. Eligible Applicants

IRC § 45D specifies certain eligibility requirements that each applicant must meet to be eligible to apply for an allocation of NMTCs. The following sets forth additional detail and certain additional dates that relate to the submission of applications under this NOAA:

1. *CDE certification:* For purposes of this NOAA, the Fund will not consider an application for an allocation of NMTCs unless: (a) The applicant is certified as a CDE at the time the Fund receives its NMTC Program allocation application; or (b) the applicant submits an application for certification as a CDE that is postmarked on or before September 8, 2004, and received by 5 p.m. ET on September 15, 2004. Applicants for certification may obtain a CDE certification application through the Fund's Web site at *http://www.cdfifund.gov*. Applications for CDE certification must be submitted as instructed in the application form. An applicant that is a community development financial institution (CDFI) or a specialized small business investment company (SSBIC) does not need to submit a CDE certification application, but must register as a CDE on the Fund's Web site on or before 5 p.m. ET on September 8, 2004. The Fund will not provide allocations of NMTCs to applicants that are not certified as CDEs. *See* Section IV.D.1.c. of this NOAA for further requirements relating to postmarks.

If an applicant that has already been certified as a CDE wishes to change its designated CDE service area, it must submit its request for such a change to the Fund; and said request must be received by the Fund by 5 p.m. ET on October 6, 2004. The CDE service area change request must be sent from the applicant's authorized representative and include the applicable CDE control number, the revised service area designation, and an updated accountability chart that reflects representation from Low-Income Communities in the revised service area. The service area change request must be sent by e-mail to *cdfihelp@cdfi.treas.gov* or by facsimile to (202) 622–7754.

2. *Prior awardees or Allocatees:* Applicants must be aware that success in a prior round of any of the Fund's programs is not indicative of success under this NOAA. Prior awardees of any component of the Fund's Community Development Financial Institutions (CDFI) Program, Bank Enterprise Award (BEA) Program, or any other Fund program and prior Allocatees under the NMTC Program are eligible to apply under this NOAA, except as follows:

(a) *Prior Allocatees and Qualified Equity Investment issuance requirements:* A prior Allocatee in the first round of the NMTC Program (CY 2001–2002) is not eligible to receive a NMTC Allocation pursuant to this NOAA unless the Allocatee can demonstrate that, as of 11:59 p.m. e.t. on January 21, 2005, it has: (i) Issued and received cash from its investors for at least 50 percent of its Qualified Equity Investments relating to its prior NMTC Allocation; or (ii) issued and received cash from its investors for at least 40 percent of its Qualified Equity Investments and that at least 80 percent of its total NMTC Allocation has been exchanged for cash from or has been committed by its investors. A prior Allocatee in the second round of the NMTC Program (CY 2003–2004) is not eligible to receive a NMTC Allocation pursuant to this NOAA unless the Allocatee can demonstrate that, as of 11:59 p.m. e.t. on January 21, 2005, it has: (i) Issued and received cash from its investors for at least 50 percent of its Qualified Equity Investments relating to its prior NMTC Allocation; or (ii) issued and received cash from its investors for at least 20 percent of its Qualified Equity Investments and that at least 60 percent of its total NMTC Allocation has been exchanged for cash from or has been committed by its investors. Further, an entity is not eligible to receive a NMTC Allocation pursuant to this NOAA if another entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund) is a prior Allocatee and has not, as of 11:59 p.m. e.t. on January 21, 2005, met the requirements for the issuance and/or commitment of Qualified Equity Investments as set forth above for the Allocatees in the first and second allocation rounds of the NMTC Program.

For purposes of this section of the NOAA, the Fund will only count as "issued" those Qualified Equity Investments that have been recorded in the Fund's Allocation Tracking System (ATS) by 11:59 p.m. e.t. on January 21, 2005. Allocatees and their Subsidiary transferees, if any, are advised to access ATS to record each Qualified Equity Investment that they issue to an investor in exchange for cash. For purposes of this section of the NOAA, "committed" Qualified Equity Investments are only those Equity Investments that are evidenced by a written, signed document in which an investor: (i) Commits to make an investment in the Allocatee in a specified amount and on specified terms; (ii) has made an initial disbursement of the investment proceeds to the Allocatee, and such initial disbursement has been recorded in ATS as a Qualified Equity Investment; (iii) commits to disburse the remaining investment proceeds to the Allocatee based on specified amounts and payment dates; and (iv) commits to make the final disbursement to the Allocatee no later than January 21, 2008. The applicant will be required, upon notification from the Fund, to submit adequate documentation to substantiate the required issuances of and commitments for Quality Equity Investments.

(b) *Failure to meet reporting requirements:* The Fund will not consider an application submitted by an applicant if the applicant, or an entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund) is a prior Fund awardee or Allocatee under any Fund program and is not current on the reporting requirements set forth in a previously executed assistance, allocation or award agreement(s), as of the application deadline of this NOAA. Please note that the Fund only acknowledges the receipt of reports that are complete. As such, incomplete reports or reports that are deficient of required elements will not be recognized as having been received.

(c) *Pending resolution of noncompliance:* If an applicant is a prior awardee or Allocatee under any Fund program and if: (i) It has submitted complete and timely reports to the Fund that demonstrate noncompliance with a previous assistance, award or Allocation Agreement; and (ii) the Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award or Allocation Agreement, the Fund will consider the applicant's application under this NOAA pending full resolution, in the sole determination of the Fund, of the

noncompliance. Further, if another entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund), is a prior Fund awardee or Allocatee and if such entity: (i) Has submitted complete and timely reports to the Fund that demonstrate noncompliance with a previous assistance, award or Allocation Agreement; and (ii) the Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award or Allocation Agreement, the Fund will consider the applicant's application under this NOAA pending full resolution, in the sole determination of the Fund, of the noncompliance.

(d) *Default status:* The Fund will not consider an application submitted by an applicant that is a prior Fund awardee or Allocatee under any Fund program if, as of the application deadline of this NOAA, the Fund has made a final determination that such applicant is in default of a previously executed assistance, allocation or award agreement(s) and the Fund has provided written notification of such determination to such applicant. Further, an entity is not eligible to apply for an allocation pursuant to this NOAA if, as of the application deadline of this NOAA, the Fund has made a final determination that another entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund): (i) Is a prior Fund awardee or Allocatee under any Fund program; (ii) has been determined by the Fund to be in default of a previously executed assistance, allocation or award agreement(s); and (iii) the Fund has provided written notification of such determination to the defaulting entity.

(e) *Termination in default:* The Fund will not consider an application submitted by an applicant that is a prior Fund awardee or Allocatee under any Fund program if, within the 12-month period prior to the application deadline of this NOAA, the Fund has made a final determination that such applicant's prior award or allocation terminated in default of a previously executed assistance, allocation or award agreement(s) and the Fund has provided written notification of such determination to such applicant. Further, an entity is not eligible to apply for an allocation pursuant to this NOAA if, within the 12-month period prior to the application deadline of this NOAA, the Fund has made a final determination that another entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund), is a prior Fund awardee or Allocatee under any Fund program whose award or allocation terminated in default of a previously executed assistance, allocation or award agreement(s), and the Fund has provided written notification of such determination to the defaulting entity.

(f) *Undisbursed balances:* The Fund will not consider an application submitted by an applicant that is a prior Fund awardee under any Fund program if the applicant has a balance of undisbursed funds (defined below) under said prior award(s), as of the application deadline of this NOAA. Further, an entity is not eligible to apply for an award pursuant to this NOAA if another entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund), is a prior Fund awardee under any Fund program, and has a balance of undisbursed funds under said prior award(s), as of the application deadline of this NOAA. In a case where another entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund), is a prior Fund awardee under any Fund program, and has a balance of undisbursed funds under said prior award(s), as of the application deadline of this NOAA, the Fund will include the combined awards of the applicant and such affiliated entities when calculating the amount of undisbursed funds.

For purposes of this section, "undisbursed funds" is defined as: (i) In the case of a prior BEA Program award(s), any balance of award funds equal to or greater than five (5) percent of the total prior BEA Program award(s) that remains undisbursed more than three (3) years after the end of the calendar year in which the Fund signed an award agreement with the awardee; and (ii) in the case of a prior CDFI Program or other Fund program award(s), any balance of award funds equal to or greater than five (5) percent of the total prior award(s) that remains undisbursed more than two (2) years after the end of the calendar year in which the Fund signed an assistance agreement with the awardee.

"Undisbursed funds" does not include (i) tax credit allocation authority made available through the NMTC Program; (ii) any award funds for which the Fund received a full and complete disbursement request from the awardee by the application deadline of this NOAA; and (iii) any award funds for an award that has been terminated, expired, rescinded or deobligated by the Fund.

(g) *Contact the Fund:* Accordingly, applicants that are prior awardees and/or Allocatees under any other Fund program are advised to: (i) Comply with the requirements specified in assistance, allocation and/or award agreement(s), and (ii) contact the Fund to ensure that all necessary actions are underway for the disbursement of any outstanding balance of a prior award(s). All outstanding reports, compliance or disbursement questions should be directed to the Grants Management and Compliance Manager by e-mail at *gmc@cdfi.treas.gov;* by telephone at (202) 622–8226; by facsimile at (202) 622–6453; or by mail to CDFI Fund, 601 13th Street, NW., Suite 200 South, Washington, DC 20005. The Fund will respond to applicants' reporting, compliance or disbursement questions between the hours of 9 a.m. and 5 p.m. e.t., starting the date of publication of this NOAA through October 4, 2004 (2 days before the application deadline). The Fund will not respond to applicants' reporting, compliance or disbursement phone calls or e-mail inquiries that are received after 5 p.m. e.t. on October 4, 2004, until after the funding application deadline of October 6, 2004.

3. *Entities that propose to transfer NMTCs to Subsidiaries:* Both for-profit and non-profit CDEs may apply to the Fund for allocations of NMTCs, but only a for-profit CDE is permitted to provide NMTCs to its investors. A non-profit applicant wishing to apply for a NMTC Allocation must demonstrate, prior to entering into an Allocation Agreement with the Fund, that: (i) it controls one or more Subsidiaries that are for-profit entities; and (ii) it intends to transfer the full amount of any NMTC Allocation it receives to said Subsidiary. The Subsidiary transferee should: (i) Submit a CDE certification application to the Fund within 30 days after the non-profit applicant receives a Notice of Allocation from the Fund; and (ii) must be certified as a CDE prior to entering into an Allocation Agreement with the Fund. The NMTC Allocation transfer must be pre-approved by the Fund, in its sole discretion, and will be a condition of the Allocation Agreement. A for-profit applicant that receives a NMTC Allocation may transfer such NMTC Allocation to its for-profit Subsidiary or Subsidiaries, provided that said Subsidiary transferees have been certified as CDEs and such transfer is pre-approved by the Fund, in its sole discretion, which transfer will be a condition of the Allocation Agreement.

An applicant wishing to transfer all or a portion of its NMTC Allocation to a Subsidiary is not required to create the Subsidiary prior to submitting a NMTC allocation application to the Fund. Rather, the Fund will require each applicant to indicate, in its NMTC allocation application, whether it intends to transfer all or a portion of its NMTC Allocation to a Subsidiary and its timeline for doing so. As stated above, in no circumstance will the Fund authorize such a transfer until the Fund has certified the Subsidiary transferee as a CDE.

4. *Entities that submit applications together with Affiliates; applications from common enterprises:* As part of the allocation application review process, the Fund considers whether applicants are Affiliates, as such term is defined in the allocation application. If an applicant and its Affiliates wish to submit allocation applications, they must do so collectively, in one application; an applicant and its Affiliates may not submit separate allocation applications. If Affiliated entities submit multiple applications, the Fund reserves the right either to reject all such applications received or to select a single application as the only one that will be considered for an allocation.

For purposes of this NOAA, in addition to assessing whether applicants meet the definition of the term "Affiliate" found in the allocation application, the Fund will consider: (i) Whether the activities described in applications submitted by separate entities are, or will be, operated or managed as a common enterprise that, in fact or effect, could be viewed as a single entity; and (ii) whether the business strategies and/or activities described in applications submitted by separate entities are so closely related that, in fact or effect, they could be viewed as substantially identical applications. In such cases, the Fund reserves the right either to reject all applications received from all such entities or to select a single application as the only one that will be considered for an allocation.

5. *Entities created as a series of funds:* An applicant whose business structure consists of an entity with a series of funds may apply for CDE certification as a single entity, or as multiple entities. If such an applicant represents that it is properly classified for Federal tax purposes as a single partnership or corporation, it may apply for CDE certification as a single entity. If an applicant represents that it is properly classified for Federal tax purposes as multiple partnerships or corporations, then it may submit a single CDE certification application on behalf of the entire series of funds, and each fund must be separately certified as a CDE. Applicants should note, however, that receipt of CDE certification as a single entity or as multiple entities is not a determination that an applicant and its related funds are properly classified as a single entity or as multiple entities for Federal tax purposes. Regardless of whether the series of funds is classified as a single partnership or corporation or as multiple partnerships or corporations, an applicant may not transfer any NMTC Allocations it receives to one or more of its funds unless the transfer is pre-approved by the Fund, in its sole discretion, which will be a condition of the Allocation Agreement.

6. *Entities that are BEA Program awardees:* An insured depository institution investor (and its Affiliates and Subsidiaries) may not receive a NMTC Allocation in addition to a BEA Program award for the same investment in a CDE. Likewise, an insured depository institution investor (and its Affiliates and Subsidiaries) may not receive a BEA Program award in addition to a NMTC Allocation for the same investment in a CDE.

IV. Application and Submission Information

A. Address To Request Application Package

Applicants may submit applications under this NOAA either electronically or in paper form. Shortly following the publication of this NOAA, the Fund will make available the electronic allocation application on its Web site at *http://www.cdfifund.gov*. The Fund will send application materials to applicants that are unable to download them from the Web site. To have application materials sent to you, contact the Fund by telephone at (202) 622–6355; by e-mail at *cdfihelp@cdfi.treas.gov;* or by facsimile at (202) 622–7754. These are not toll free numbers.

B. Application Content Requirements

Detailed application content requirements are found in the application related to this NOAA. Applicants must submit all materials described in and required by the application by the applicable deadlines. Applicants will not be afforded an opportunity to provide any missing materials or documentation. Electronic applications must be submitted solely by using the format made available at the Fund's Web site. Additional information, including instructions relating to the submission of signature forms and supporting information, is set forth in further detail in the electronic application. An application must include a valid and current Employer Identification Number (EIN) issued by the Internal Revenue Service and assigned to the applicant and, if applicable, its Controlling Entity; electronic applications without a valid EIN are incomplete and cannot be transmitted to the Fund; paper applications submitted without a valid EIN will be rejected as incomplete and returned to the sender. For more information on obtaining an EIN, please contact the Internal Revenue Service at (800) 829–4933 or *http://www.irs.gov*. An applicant may not submit more than one application in response to this NOAA. In addition, as stated in Section III.A.4 of this NOAA, an applicant and its Affiliates must collectively submit only one allocation application; an applicant and its Affiliates may not submit separate allocation applications.

C. Form of Application Submission

Applicants may submit applications under this NOAA either electronically or in paper form. Applications sent by facsimile or by e-mail will not be accepted. In order to expedite application review, the Fund expects applicants to submit applications electronically (via an Internet-based application) in accordance with the instructions provided on the Fund's website. Submission of an electronic application will facilitate the processing and review of applications and the selection of Allocatees; further it will assist the Fund in the implementation of electronic reporting requirements.

1. *Electronic applications:* Electronic applications must be submitted solely by using the Fund's website and must be sent in accordance with the submission instructions provided in the electronic application form. Applicants need access to Internet Explorer 5.5 or higher or Netscape Navigator 6.0 or higher, Windows 98 or higher (or other system compatible with the above Explorer and Netscape software) and optimally at least a 56Kbps Internet connection in order to meet the electronic application submission requirements. The Fund's electronic application system will only permit the submission of applications in which all required questions and tables are fully completed. Additional information, including instructions relating to the submission of signature forms and supporting information, is set forth in further detail in the electronic application.

2. *Paper applications:* If an applicant is unable to submit an electronic application, it must submit to the Fund a request for a paper application using the NMTC Program Paper Application Submission Form, and the request must be received by 5 p.m. e.t. on September 22, 2004. The NMTC Program Paper Application Submission Form may be obtained from the Fund's Web site at *http://www.cdfifund.gov* or the form may be requested by e-mail to *paper_request@cdfi.treas.gov* or by facsimile to (202) 622–7754. The completed NMTC Program Paper Application Submission Form should be directed to the Fund's Chief Information Officer and must be sent by facsimile to (202) 622–7754.

D. Application Submission Dates and Times

1. *Application deadlines:* a. *Electronic applications* must be received by 5 p.m. e.t. on October 6, 2004. Electronic applications cannot be transmitted or received after 5 p.m. e.t. on October 6, 2004. In addition, applicants that submit electronic applications must separately submit (by mail or other courier delivery service) an original signature page, and all other required paper attachments. The original signature page and additional documents must be postmarked on or before October 12, 2004, and received by 5 p.m. e.t. on October 19, 2004. *See* application instructions, provided in the electronic application, for further detail. Applications and other required documents and other attachments postmarked or received after these dates and times will be rejected and returned to the sender. If the original signature page is not postmarked and received by the deadlines specified above, the application will be rejected and returned to the sender. *See* Section IV.D.1.c. of this NOAA for further requirements relating to postmarks. Additional deadlines (if any) relating to the submission of general supporting documentation will be further detailed in the electronic application. Please note that the document submission deadlines in this NOAA and/or the allocation application are strictly enforced.

b. *Paper applications,* including the requisite original signature page, and all other required paper attachments must be postmarked on or before October 6, 2004, and received by 5 p.m. e.t. on October 14, 2004. Paper applications postmarked or received after these deadlines will not be accepted for consideration and will be returned to the sender.

c. For purposes of this NOAA, the term "postmark" is defined by 26 CFR 301.7502–1. In general, the Fund will require that the postmarked document bear a postmark date that is on or before the applicable deadline. The document must be in an envelope or other appropriate wrapper, properly addressed as set forth in this NOAA and delivered by the United States Postal Service or any other private delivery service designated by the Secretary of the Treasury. For more information on designated delivery services, please see IRS Notice 2002–62, 2002–2 C.B. 574.

E. Intergovernmental Review

Not applicable.

F. Funding Restrictions

For allowable uses of investment proceeds related to an NMTC Allocation, please see 26 U.S.C. 45D and the temporary regulations issued by the Internal Revenue Service (26 CFR 1.45D–1T, published on December 26, 2001, and amended on March 11, 2004) and related guidance. Please see Section I., above, for the Programmatic Improvements of this NOAA.

G. Other Submission Requirements

Addresses: Paper applications and the signature page and attachments for electronic applications must be sent to: CDFI Fund Grants Management and Compliance Manager, NMTC Program, Bureau of Public Debt, 200 Third Street, Room 10, Parkersburg, WV 26101. The telephone number to be used in conjunction with overnight delivery or mailings to this address is (304) 480–5450. Paper applications and the signature page or attachments will not be accepted at the Fund's offices in Washington, DC. Paper applications and signature pages or attachments received in the Fund's offices will be rejected and returned to the sender. Except for the signature page and attachments, electronic applications must be submitted solely by using the Fund's website and must be sent in accordance with the submission instructions provided in the electronic application form.

V. Application Review Information

There are two parts to the substantive review process for each allocation application—Phase 1 and Phase 2. In Phase 1, the Fund will evaluate each application, assigning points and numeric scores with respect to the criteria described below. In Phase 2, the Fund will rank applicants in accordance with the procedures set forth in Section V.B. of this NOAA.

A. Criteria

1. *Business Strategy* (25-point maximum). (a) In assessing an applicant's business strategy, reviewers will consider, among other things: the applicant's products, services and investment criteria; the prior performance of the applicant or its Controlling Entity, particularly as it relates to making similar kinds of investments as those it proposes to make with the proceeds of Qualified Equity Investments; the applicant's prior performance in providing capital or technical assistance to disadvantaged businesses or communities; the projected level of the applicant's pipeline of potential investments; and the extent to which the applicant intends to make Qualified Low-Income Community Investments in one or more businesses in which persons unrelated to the entity hold a majority equity interest.

Under the Business Strategy criterion, an applicant will generally score well to the extent that it will deploy debt or investment capital in products or services which: (i) Are designed to meet the needs of underserved markets; (ii) are flexible or non-traditional in form; and (iii) focus on customers or partners that typically lack access to conventional sources of capital. An applicant will also score well to the extent that it: (i) Has a track record of successfully providing products and services similar to those it intends to use with the proceeds of Qualified Equity Investments; (ii) has identified, or has a process for identifying, potential transactions; (iii) demonstrates a likelihood of issuing Qualified Equity Investments and making the related Qualified Low-Income Community Investments in a time period that is significantly shorter than the 5-year period permitted under IRC § 45D(b)(1); and (iv) in the case of an applicant proposing to purchase loans from CDEs, the applicant will require the CDE selling such loans to re-invest the proceeds of the loan sale to provide additional products and services to Low-Income Communities.

(b) *Priority Points:* In addition, as provided by IRC § 45D(f)(2), the Fund will ascribe additional points to entities that meet either or both of the statutory priorities. First, the Fund will give up to five (5) additional points to any applicant that has a record of having successfully provided capital or technical assistance to disadvantaged businesses or communities. Second, the Fund will give five (5) additional points to any applicant that intends to satisfy the requirement of IRC § 45D(b)(1)(B) by

making Qualified Low-Income Community Investments in one or more businesses in which persons unrelated to an applicant (within the meaning of IRC § 267(b) or IRC § 707(b)(1)) hold the majority equity interest. Applicants may earn points for either or both statutory priorities. Thus, applicants that meet the requirements of both priority categories can receive up to a total of ten (10) additional points. A record of having successfully provided capital or technical assistance to disadvantaged businesses or communities may be demonstrated either by the past actions of an applicant itself or by its Controlling Entity (e.g., where a new CDE is established by a nonprofit corporation with a history of providing assistance to disadvantaged communities). An applicant that receives additional points for intending to make investments in unrelated businesses and is awarded a NMTC Allocation must meet the requirements of IRC § 45D(b)(1)(B) by investing substantially all of the proceeds from the aggregate amount of its Qualified Equity Investments in unrelated businesses. The Fund will factor in an applicant's priority points when ranking applicants during Phase 2 of the review process, as described below.

2. *Capitalization Strategy* (25-point maximum). In assessing an applicant's capitalization strategy, reviewers will consider, among other things: the extent to which the applicant has secured investments, commitments to invest, or indications of interest in investments from investors, commensurate with its requested amount of tax credit allocations; the applicant's strategy for identifying additional investors, if necessary, including the applicant's (or its Controlling Entity's) prior performance with raising equity from investors, particularly for-profit investors; the extent to which the applicant identifies how existing investors will leverage their investments in Low-Income Communities or how new investors will be brought into such investments; the distribution of the economic benefits of the tax credit; the extent to which the applicant intends to invest the proceeds from the aggregate amount of its Qualified Equity Investments at a level that exceeds the requirements of IRC § 45D(b)(1)(B), including the extent to which the applicant has identified the financial resources outside of the NMTC investments necessary to support its operations or finance its activities; and the applicant's timeline for utilizing an NMTC Allocation.

An applicant will generally score well under this section to the extent that: (a) It has secured investor commitments, or has a reasonable strategy for obtaining such commitments; (b) its request for allocations is commensurate with both the level of Qualified Equity Investments it is likely to raise and its expected investment strategy to deploy funds raised with NMTCs; (c) it generally demonstrates that the economic benefits of the tax credit will be passed through to end users; (d) it is likely to leverage other sources of funding in addition to NMTC investor dollars; and (e) it intends to invest the proceeds from the aggregate amount of its Qualified Equity Investments at a level that exceeds the requirements of IRC § 45D(b)(1)(B). In the case of an applicant proposing to raise investor funds from organizations that also will identify or originate transactions for the applicant or from affiliated entities, said applicant will score well to the extent that it will offer products with more favorable rates or terms than those currently offered by the investor and/or will target its activities to areas of greater economic distress than those currently targeted by the investor.

3. *Management Capacity* (25-point maximum). In assessing an applicant's management capacity, reviewers will consider, among other things, the qualifications of the applicant's principals, its board members, its management team, and other essential staff or contractors, with specific focus on: experience in deploying capital or technical assistance, including activities similar to those described in the applicant's business strategy; experience in raising capital; asset management and risk management experience; experience with fulfilling compliance requirements of other governmental programs, including other tax programs; and the applicant's (or its Controlling Entity's) financial health. Reviewers will also consider the extent to which an applicant has protocols in place to ensure ongoing compliance with NMTC Program requirements, and the level of involvement of community representatives and other stakeholders in the design, implementation or monitoring of an applicant's business plan and strategy. In the case of an applicant (or any entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund)) that has received a NMTC Allocation from the Fund under a prior allocation round, reviewers will consider the activities that have occurred to date with respect to the prior allocation(s).

An applicant will generally score well under this section to the extent that its management team or other essential personnel have experience in: (a) Deploying capital or technical assistance in Low-Income Communities, particularly those likely to be served by the applicant with the proceeds of Qualified Equity Investments; (b) raising capital, particularly from for-profit investors; (c) asset and risk management; and (d) fulfilling government compliance requirements, particularly tax program compliance. An applicant will also score well to the extent it has policies and systems in place to ensure ongoing compliance with NMTC Program requirements, and to the extent that Low-Income Community stakeholders play an active role in designing or implementing its business plan. In the case of an applicant (or any entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund)) that has received a NMTC Allocation from the Fund under a prior allocation round, the applicant will score well to the extent it can: (a) Demonstrate that substantial activities have occurred through its prior allocation(s); and (b) substantiate a need for additional allocation authority.

4. *Community Impact* (25-point maximum). In assessing the impact on communities expected to result from the applicant's proposed investments, reviewers will consider, among other things, the degree to which the applicant is likely to achieve significant and measurable community development and economic impacts in its Low-Income Communities, and whether the applicant is working in particularly economically distressed markets and/or in concert with Federal, state or local government or community economic development initiatives (*e.g.*, Empowerment Zones, Enterprise Communities, and Renewal Communities). An applicant will generally score well under this section to the extent that: (a) it articulates how its strategy is likely to produce significant and measurable community development and economic impacts that would not be achieved without NMTCs; and (b) it is working in particularly economically distressed or otherwise underserved communities and/or in concert with other Federal, state or local government or community economic development initiatives.

B. Review and Selection Process

All allocation applications will be reviewed for eligibility and completeness. The Fund may consult with the IRS on the eligibility requirements under IRC § 45D. To be

complete, the application must contain, at a minimum, all information described as required in the application form. An incomplete application will be rejected and returned to the sender. Once the application has been determined to be eligible and complete, the Fund will conduct the substantive review of each application in two parts (Phase 1 and Phase 2) in accordance with the criteria and procedures generally described in this NOAA and the allocation application.

Phase 1: Fund reviewers will evaluate and score each application in the first part of the review process. An applicant must exceed a minimum overall aggregate base score threshold *and* exceed a minimum aggregate section score threshold in each of the four application sections (Business Strategy, Capitalization Strategy, Management Capacity, and Community Impact) in order to advance from the first part of the substantive review process. If, in the case of a particular application, a reviewer's total base score or section score(s) (in one or more of the four application sections), varies significantly from the median of the reviewers' total base scores or section scores for such application, the Fund may, in its sole discretion, obtain the comments and recommendations of an additional reviewer to determine whether the anomalous score should be replaced with the score of the additional reviewer.

Phase 2: Once the Fund has determined which applicants have met the required minimum overall aggregate base score and aggregate section score thresholds, the Fund will rank applicants on the basis of their combined scores in the Business Strategy and Community Impact sections of the application and will make adjustments to each applicant's priority points so that these points maintain the same relative weight in the ranking of applicant scores as in the first two allocation rounds. The Fund will award allocations in the order of this ranking, subject to applicants' meeting all other eligibility requirements; provided, however, that the Fund, in its sole discretion, reserves the right to reject an application and/or adjust award amounts as appropriate based on information obtained during the review process.

In the case of an applicant (or any entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund)) that has previously received an award or allocation from the Fund through any Fund program, the Fund will consider and will deduct points for the applicant's (or any entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund)) failure to meet the reporting deadlines set forth in any assistance, award or Allocation Agreement(s) with the Fund during the applicant's two complete fiscal years prior to the application deadline of this NOAA (generally FY 2002 and 2003). All outstanding reports or compliance questions should be directed to the Grants Management and Compliance Manager by e-mail at *gmc@cdfi.treas.gov;* by telephone at (202) 622–8226; by facsimile at (202) 622–6453; or by mail to CDFI Fund, 601 13th Street, NW, Suite 200 South, Washington, DC 20005. The Fund will respond to reporting or compliance questions between the hours of 9 a.m. and 5 p.m. e.t., starting the date of the publication of this NOAA through October 4, 2004. The Fund will not respond to reporting or compliance phone calls or e-mail inquiries that are received after 5 p.m. e.t. on October 4, 2004, until after the funding application deadline of October 6, 2004.

The Fund reserves the right to reject any NMTC allocation application in the case of a prior Fund awardee, if such applicant has failed to comply with the terms, conditions, and other requirements of the prior or existing assistance or award agreement(s) with the Fund. The Fund reserves the right to reject any NMTC allocation application in the case of a prior Fund Allocatee, if such applicant has failed to comply with the terms, conditions, and other requirements of its prior or existing Allocation Agreement(s) with the Fund. The Fund also reserves the right to reject any NMTC allocation application in the case of any applicant, if an entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund), has failed to meet the terms, conditions and other requirements of any prior or existing assistance agreement, award agreement or Allocation Agreement with the Fund.

As a part of the substantive review process, the Fund may permit reviewer(s) to make telephone calls to applicants for the sole purpose of obtaining, clarifying or confirming application information. In no event shall such contact be construed to permit an applicant to change any element of its application. Reviewers will not contact applicants without the prior approval of the Fund. At this point in the process, an applicant may be required to submit additional information about its application in order to assist the Fund with its final evaluation process. Such requests must be responded to within the time parameters set by the Fund. The selecting official(s) will make a final allocation determination based on an applicant's file, including without limitation, eligibility under IRC § 45D, the reviewers' scores and the amount of allocation authority available. In the case of applicants (or any entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund)) that are regulated by the Federal government or a State agency (or comparable entity), the Fund's selecting official(s) reserve(s) the right to consult with and take into consideration the views of the appropriate Federal or State banking and other regulatory agencies. In the case of applicants (or any entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund)) that are also Small Business Investment Companies, Specialized Small Business Investment Companies or New Markets Venture Capital Companies, the Fund reserves the right to consult with and take into consideration the views of the Small Business Administration.

The Fund reserves the right to conduct additional due diligence, as determined reasonable and appropriate by the Fund, in its sole discretion, related to the applicant and its officers, directors, owners, partners and key employees.

Each applicant will be informed of the Fund's award decision either through a Notice of Allocation if selected for an allocation (*see* Section VI.A. of this NOAA) or a declination letter, if not selected for an allocation, which may be for reasons of application incompleteness, ineligibility or substantive issues. All applicants that are not selected for an allocation based on substantive issues will likely be given the opportunity to obtain feedback on the strengths and weaknesses of their applications. This feedback will be provided in a format and within a timeframe to be determined by the Fund, based on available resources.

The Fund further reserves the right to change its eligibility and evaluation criteria and procedures, if the Fund deems it appropriate; if said changes materially affect the Fund's award decisions, the Fund will provide information regarding the changes through the Fund's Web site.

There is no right to appeal the Fund's allocation decisions. The Fund's allocation decisions are final.

VI. Award Administration Information

A. Notice of Allocation

The Fund will signify its selection of an applicant as an Allocatee by delivering a signed Notice of Allocation to the applicant. The Notice of Allocation will contain the general terms and conditions underlying the Fund's provision of an NMTC Allocation including, but not limited to, the requirement that an Allocatee and the Fund enter into an Allocation Agreement. The applicant must execute the Notice of Allocation and return it to the Fund. By executing a Notice of Allocation, the Allocatee agrees that, if prior to entering into an Allocation Agreement with the Fund, information (including administrative errors) comes to the attention of the Fund that either adversely affects the Allocatee's eligibility for an award, or adversely affects the Fund's evaluation or scoring of the Allocatee's application, or indicates fraud or mismanagement on the part of the Allocatee, the Fund may, in its discretion and without advance notice to the Allocatee, terminate the Notice of Allocation or take such other actions as it deems appropriate. Moreover, by executing a Notice of Allocation, an Allocatee agrees that, if prior to entering into an Allocation Agreement with the Fund, the Fund determines that the Allocatee is not in compliance with the terms of any prior assistance agreement, award agreement, and/or Allocation Agreement entered into with the Fund, the Fund may, in its discretion and without advance notice to the Allocatee, either terminate the Notice of Allocation or take such other actions as it deems appropriate. The Fund reserves the right, in its sole discretion, to rescind the allocation and the Notice of Allocation if the Allocatee fails to return the Notice of Allocation, signed by the authorized representative of the Allocatee, along with any other requested documentation, by the deadline set by the Fund.

1. *Failure to meet reporting requirements:* If an Allocatee, or an entity that Controls the Allocatee, is Controlled by the Allocatee or shares common management officials with the Allocatee (as determined by the Fund) is a prior Fund awardee or Allocatee under any Fund program and is not current on the reporting requirements set forth in the previously executed assistance, allocation or award agreement(s), as of the date of the Notice of Allocation, the Fund reserves the right, in its sole discretion, to delay entering into an Allocation Agreement and/or to impose limitations on an Allocatee's ability to issue Qualified Equity Investments to investors until said prior awardee or Allocatee is current on the reporting requirements in the previously executed assistance, allocation or award agreement(s). Please note that the Fund only acknowledges the receipt of reports that are complete. As such, incomplete reports or reports that are deficient of required elements will not be recognized as having been received. If said prior awardee or Allocatee is unable to meet this requirement within the timeframe set by the Fund, the Fund reserves the right, in its sole discretion, to terminate and rescind the Notice of Allocation and the allocation made under this NOAA.

2. *Pending resolution of noncompliance:* If an applicant is a prior awardee or Allocatee under any Fund program and if: (i) It has submitted complete and timely reports to the Fund that demonstrate noncompliance with a previous assistance, award or Allocation Agreement; and (ii) the Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award or Allocation Agreement, the Fund reserves the right, in its sole discretion, to delay entering into an Allocation Agreement and/or to impose limitations on the Allocatee's ability to issue Qualified Equity Investments to investors, pending full resolution, in the sole determination of the Fund, of the noncompliance. Further, if another entity that Controls the applicant, is Controlled by the applicant or shares common management officials with the applicant (as determined by the Fund), is a prior Fund awardee or Allocatee and if such entity: (i) Has submitted complete and timely reports to the Fund that demonstrate noncompliance with a previous assistance, award or Allocation Agreement; and (ii) the Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award or Allocation Agreement, the Fund reserves the right, in its sole discretion, to delay entering into an Allocation Agreement and/or to impose limitations on the Allocatee's ability to issue Qualified Equity Investments to investors, pending full resolution, in the sole determination of the Fund, of the noncompliance. If the prior awardee or Allocatee in question is unable to satisfactorily resolve the issues of noncompliance, in the sole determination of the Fund, the Fund reserves the right, in its sole discretion, to terminate and rescind the Notice of Allocation and the allocation made under this NOAA.

3. *Default status:* If, at any time prior to entering into an Allocation Agreement through this NOAA, the Fund has made a final determination that an Allocatee that is a prior Fund awardee or Allocatee under any Fund program is in default of a previously executed assistance, allocation or award agreement(s) and has provided written notification of such determination to the Allocatee, the Fund reserves the right, in its sole discretion, to delay entering into an Allocation Agreement and/or to impose limitations on the Allocatee's ability to issue Qualified Equity Investments to investors, until said prior awardee or Allocatee has submitted a complete and timely report demonstrating full compliance with said agreement within a timeframe set by the Fund. Further, if at any time prior to entering into an Allocation Agreement through this NOAA, the Fund has made a final determination that another entity that Controls the Allocatee, is Controlled by the applicant or shares common management officials with the Allocatee (as determined by the Fund), is a prior Fund awardee or Allocatee under any Fund program, and is in default of a previously executed assistance, allocation or award agreement(s) and has provided written notification of such determination to the defaulting entity, the Fund reserves the right, in its sole discretion, to delay entering into an Allocation Agreement and/or to impose limitations on the Allocatee's ability to issue Qualified Equity Investments to investors, until said prior awardee or Allocatee has submitted a complete and timely report demonstrating full compliance with said agreement within a timeframe set by the Fund. If said prior awardee or Allocatee is unable to meet this requirement, the Fund reserves the right, in its sole discretion, to terminate and rescind the Notice of Allocation and the allocation made under this NOAA.

4. *Termination in default:* If, within the 12-month period prior to entering into an Allocation Agreement through this NOAA, the Fund has made a final determination that an Allocatee that is a prior Fund awardee or Allocatee under any Fund program whose award or allocation was terminated in default of such prior agreement and the Fund has provided written notification of such determination to such organization, the Fund reserves the right, in its sole discretion, to delay entering into an Allocation Agreement and/or to impose limitations on the Allocatee's ability to issue Qualified

Equity Investments to investors. Further, if within the 12-month period prior to entering into an Allocation Agreement through this NOAA, the Fund has made a final determination that another entity that Controls the Allocatee, is Controlled by the Allocatee or shares common management officials with the Allocatee (as determined by the Fund), is a prior Fund awardee or Allocatee under any Fund program whose award or allocation was terminated in default of such prior agreement, and the Fund has provided written notification of such determination to the defaulting entity, the Fund reserves the right, in its sole discretion, to delay entering into an Allocation Agreement and/or to impose limitations on the Allocatee's ability to issue Qualified Equity Investments to investors.

B. Allocation Agreement

Each applicant that is selected to receive a NMTC Allocation (including the applicant's Subsidiary transferees) must enter into an Allocation Agreement with the Fund. The Allocation Agreement will set forth certain required terms and conditions of the NMTC Allocation which may include, but not be limited to, the following: (i) The amount of the awarded NMTC Allocation; (ii) the approved uses of the awarded NMTC Allocation (*e.g.*, loans to or equity investments in Qualified Active Low-Income Businesses or loans to or equity investments in other CDEs); (iii) the approved service area(s) in which the proceeds of Qualified Equity Investments may be used; (iv) the time period by which the applicant may obtain Qualified Equity Investments from investors; and (v) reporting requirements for all applicants receiving NMTC Allocations. If an applicant has represented in its NMTC allocation application that it intends to invest substantially all of the proceeds from its investors in businesses in which persons unrelated to the applicant hold a majority equity interest, the Allocation Agreement will contain a covenant whereby said applicant agrees that it will invest substantially all of said proceeds in businesses in which persons unrelated to the applicant hold a majority equity interest.

In addition to entering into an Allocation Agreement, each applicant selected to receive a NMTC Allocation must furnish to the Fund an opinion from its legal counsel, the content of which will be further specified in the Allocation Agreement, to include, among other matters, an opinion that an applicant (and its Subsidiary transferees, if any): (i) Is duly formed and in good standing in the jurisdiction in which it was formed and/or operates; (ii) has the authority to enter into the Allocation Agreement and undertake the activities that are specified therein; (iii) has no pending or threatened litigation that would materially affect its ability to enter into and carry out the activities specified in the Allocation Agreement; and (iv) is not in default of its articles of incorporation, bylaws or other organizational documents, or any agreements with the Federal government.

If an Allocatee identifies Subsidiary transferees, the Fund reserves the right to require an Allocatee to provide supporting documentation evidencing that it Controls such entities prior to entering into an Allocation Agreement with the Allocatee and its Subsidiary transferees. The Fund reserves the right, in its sole discretion, to rescind its Notice of Allocation if the Allocatee fails to return the Allocation Agreement, signed by the authorized representative of the Allocatee, and/or provide the Fund with any other requested documentation, within the deadlines set by the Fund.

C. Fees

The Fund reserves the right, in accordance with applicable Federal law and if authorized, to charge allocation reservation and/or compliance monitoring fees to all entities receiving NMTC Allocations. Prior to imposing any such fee, the Fund will publish additional information concerning the nature and amount of the fee.

D. Reporting

The Fund will collect information, on at least an annual basis, from all applicants that are awarded NMTC Allocations and/or are recipients of Qualified Low-Income Community Investments, including such audited financial statements and opinions of counsel as the Fund deems necessary or desirable, in its sole discretion. The Fund will use such information to monitor each Allocatee's compliance with the provisions of its Allocation Agreement and to assess the impact of the NMTC Program in Low-Income Communities. The Fund may also provide such information to the IRS in a manner consistent with IRC § 6103 so that the IRS may determine, among other things, whether the Allocatee has used substantially all of the proceeds of each Qualified Equity Investment raised through its NMTC Allocation to make Qualified Low-Income Community Investments. The Allocation Agreement shall further describe the Allocatee's reporting requirements.

The Fund reserves the right, in its sole discretion, to modify these reporting requirements if it determines it to be appropriate and necessary; however, such reporting requirements will be modified only after due notice to Allocatees.

VII. Agency Contacts

The Fund will provide programmatic and information technology support related to the allocation application between the hours of 9 a.m. and 5 p.m. e.t. through October 4, 2004. The Fund will not respond to phone calls or e-mails concerning the application that are received after 5 p.m. e.t. on October 4, 2004, until after the allocation application deadline of October 6, 2004. Applications and other information regarding the Fund and its programs may be obtained from the Fund's Web site at *http://www.cdfifund.gov*. The Fund will post on its website responses to questions of general applicability regarding the NMTC Program.

A. Information Technology Support

Technical support can be obtained by calling (202) 622–2455 or by e-mail at *ithelpdesk@cdfi.treas.gov*. People who have visual or mobility impairments that prevent them from accessing the Low-Income Community maps using the Fund's Web site should call (202) 622–2455 for assistance. These are not toll free numbers.

B. Programmatic Support

If you have any questions about the programmatic requirements of this NOAA, contact the Fund's NMTC Program Manager by e-mail at *cdfihelp@cdfi.treas.gov*, by telephone at (202) 622–6355, by facsimile at (202) 622–7754, or by mail at CDFI Fund, 601 13th Street, NW., Suite 200 South, Washington, DC 20005. These are not toll-free numbers.

C. Administrative Support

If you have any questions regarding the administrative requirements of this NOAA, contact the Fund's Grants Management and Compliance Manager by e-mail at *cdfihelp@cdfi.treas.gov*, by telephone at (202) 622–8226, by facsimile at (202) 622–6453, or by mail at CDFI Fund, 601 13th Street, NW., Suite 200 South, Washington, DC 20005. These are not toll free numbers.

D. IRS Support

For questions regarding the tax aspects of the NMTC Program, contact Branch Five, Office of the Associate Chief Counsel (Passthroughs and

Special Industries), IRS, by telephone at (202) 622–3040, by facsimile at (202) 622–4753, or by mail at 1111 Constitution Avenue, NW., Attn: CC:PSI:5, Washington, DC 20224. These are not toll free numbers.

E. Legal Counsel Support

If you have any questions or matters that you believe require response by the Fund's Office of Legal Counsel, please refer to the document titled "How to Request a Legal Review", found on the Fund's Web site at *http://www.cdfifund.gov*. Requests for legal reviews must be received by the Fund no later than September 7, 2004, or by such alternative date as may be agreed to by the Fund.

VIII. Information Sessions

In connection with this NOAA, the Fund intends to broadcast a no fee, interactive video teleconference information session on August 24, 2004, from 1 p.m. to 5 p.m. e.t. Registration is required, as the video teleconference information session will be broadcast to secured federal facilities. The video teleconference information session will be produced in Washington, DC, and will be downlinked via satellite to local Department of Housing and Urban Development offices in certain cities. For further information on the video teleconference information session, locations, or to register, please visit the Fund's Web site at *http://www.cdfifund.gov* or call the Fund at (202) 622–9046.

Authority: 26 U.S.C. 45D; 31 U.S.C. 321; 26 CFR 1.45D–1T.

Dated: August 4, 2004.

Arthur A. Garcia,

Director, Community Development Financial Institutions Fund.

[FR Doc. 04–18448 Filed 8–11–04; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8867

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8867, Paid Preparer's Earned Income Credit Checklist.

DATES: Written comments should be received on or before October 12, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Paid Preparer's Earned Income Credit Checklist.

OMB Number: 1545–1629.

Form Number: 8867.

Abstract: Form 8867 helps preparers meet the due diligence requirements of Internal Revenue Code section 6695(g), which was added by section 1085(a)(2) of the Taxpayer Relief Act of 1997. Paid preparers of Federal income tax returns or claims for refund involving the earned income credit (EIC) must meet the due diligence requirements in determining if the taxpayer is eligible for the EIC and the amount of the credit. Failure to do so could result in a $100 penalty for each failure. Completion of Form 8867 is one of the due diligence requirements.

Current Actions: There are no changes being made to the form at this time.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 8,368,447.

Estimated Time Per Responses: 1 hr., 1 min.

Estimated Total Annual Burden Hours: 8,535,816.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 6, 2004.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. 04–18477 Filed 8–11–04; 8:45 am]

BILLING CODE 4830–01–P

Corrections

Federal Register
Vol. 69, No. 155
Thursday, August 12, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–38–AD; Amendment 39–13736; AD 2004–15–02]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211 Trent 800 Series Turbofan Engines

Correction

In rule document 04–16548 beginning on page 44925 in the issue of Wednesday, July 28, 2004, make the following correction:

§39.13 [Corrected]

On page 44927, in the first column, in § 39.13, after paragraph (h)(2) add the folowing equation:

[FR Doc. C4–16548 Filed 8–11–04; 8:45 am]
BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–150562–03]

RIN 1545–BC67

Section 1045 Application to Partnerships

Correction

In proposed rule document 04–15964 beginning on page 42370 in the issue of Thursday, July 15, 2004, make the following correction:

§1.1045–1 [Corrected]

1. On page 42376, in the third column, in paragraph (f), in the last line, "§601.601(d)(2)(ii)(b)" should read, "§601.601(d)(2)(ii)(*b*)".

2. On page 42377, in the second column, in *Example 5.*, in the third line, "Example 4" should read, "*Example 4*".

3. On the same page, in the second column, in *Example 7.*, in the fourth line, "Example 4" should read, "*Example 4*".

[FR Doc. C4–15964 Filed 8–11–04; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Thursday,
August 12, 2004

Part II

Department of Commerce

Patent and Control Office

37 CFR Parts 1, 5, 10, 11, and 41
Rules of Practice Before the Board of Patent Appeals and Interferences; Final Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1, 5, 10, 11, and 41

RIN 0651–AB32

Rules of Practice Before the Board of Patent Appeals and Interferences

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office consolidates and simplifies the rules governing practice before the Board of Patent Appeals and Interferences to reflect developments in case law, legislation, and administrative practice.

DATES: Effective date: September 13, 2004.

FOR FURTHER INFORMATION CONTACT: *Appeals:* Jeffrey V. Nase or William F. Smith, 703–308–9797.

Otherwise: Richard Torczon, 703–308–9797.

SUPPLEMENTARY INFORMATION:

Background

The Board of Patent Appeals and Interferences (Board) has significantly overhauled its operations to address concerns about the duration of proceedings before the Board. This final rule reflects these new procedures. A notice of proposed rule making on this topic was published in the **Federal Register** (68 FR 66648, Nov. 26, 2003) and in the Official Gazette of the United States Patent and Trademark Office (1277 OG 139, Dec. 23, 2003). Seventeen comments have been received in response to that notice.

Explanation of changes

In keeping with long-standing patent practice, rules in title 37, part 1, of the Code of Federal Regulations are denominated "Rule x" in this supplementary information.

Rules 1(a)(1)(iii), 5(e), and 8(a)(2)(i)(B), and subpart E of part 1, are removed to consolidate interference information in part 41, subparts D and E.

Rules 1(a)(1)(ii); 4(a)(2); 6(d)(9); 8(a)(2)(i)(C); 9(g); 11(e); 17(b); 36; 59(a)(1); 103(g); 112; 113(a); 114(d); 131(a)(1); 136(a)(1) and (a)(2); 181(a)(3); 191; 248(c); 292(a) and (c); 295(b); 302(b); 303(c); 304(a)(1) and (a)(2); 322(a)(3); 323; 324; 565(e); 701(c)(2)(ii); 703(a)(4), (b)(3)(ii), (b)(4), (d)(2), and (e); 704(c)(9); 959; and 993 are revised to change cross-references to Board proceedings.

Rules 17(b)–(d) and (h) are revised to remove the Board fees, which will be relocated to § 41.20.

Rules 48(a)–(c) and (i) are revised, and Rule 48(j) added, to consolidate the cross-reference correction of inventorship for applications in contested cases before the Board.

Rules 55(a)(3) and (a)(4), and 136(b) are revised to eliminate the cross-references to Board rules.

Rule 116 is amended to limit amendments after a final rejection or other final action (Rule 113) in an application or in an ex parte reexamination filed under Rule 510, or after an action closing prosecution (Rule 949) in an inter partes reexamination filed under Rule 913, to such amendments filed before or with any appeal to the Board under § 41.31 or § 41.61. Amendments after appeal currently treated under Rule 116 are moved to §§ 41.33 and 41.63. Pursuant to § 41.33(a), amendments filed after appeal and prior to the filing of the appeal brief will be treated under the same standard as Rule 116. The section title is revised to reflect the scope of the rule more accurately.

Rule 116(d) is amended to permit only an amendment canceling claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, to be made in an inter partes reexamination proceeding after the right of appeal notice has issued under Rule 953, except as provided in Rule 981 or as permitted by § 41.77(b)(1).

Rule 116(e) is added to set forth a standard for treatment of an affidavit or other evidence submitted after a final rejection or other final action (Rule 113) in an application or in an ex parte reexamination filed under Rule 510, or in an action closing prosecution (Rule 949) in an inter partes reexamination filed under Rule 913, but before or with any appeal (§ 41.31 or § 41.61). The standard would be that such an affidavit or other evidence could be admitted upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. This standard is currently in effect under Rule 195 for an affidavit or other evidence submitted after appeal.

Rule 116(f) is added to prohibit affidavits and other evidence in an inter partes reexamination proceeding after the right of appeal notice under Rule 953, except as provided in Rule 981 or as permitted by § 41.77(b)(1).

Rule 191 is amended to direct appellants under 35 U.S.C. 134(a) or (b) to part 41.

Rules 192–196 are removed and reserved.

Rule 197 is amended by changing its title to "Return of jurisdiction from the Board of Patent Appeals and Interferences; termination of proceedings" to reflect the two remaining paragraphs of this section. The subject matter of paragraph (b) is moved to § 41.52 and the subject matter of paragraph (c) is moved to paragraph (b) of Rule 197. Paragraph (a) is amended to return of jurisdiction of the involved application or patent under ex parte reexamination proceeding to the examiner. Rule 41(d)(2), Fed. R. App. Procedure, controls when the mandate of the Court of Appeals will issue in the event that a party filed a petition for writ of certiorari to the United States Supreme Court. Unless a party petitioning for a writ of certiorari seeks and obtains a stay of the appellate court's mandate, proceedings will be considered terminated with the issuance of the mandate, as noted in Rule 197(b)(2).

Rule 198 is amended by changing its title to "Reopening after a final decision of the Board of Patent Appeals and Interferences" to reflect the substance of the section and to clarify that it applies when a decision by the Board of Patent Appeals and Interferences on appeal has become final for judicial review.

Rule 324(a) and (c) are revised, and Rule 324(d) added, to consolidate cross-references to correction of inventorship for patents in contested cases before the Board.

Rule 959 is revised to direct inter partes reexamination participants to part 41 for information about appeals in such proceedings.

Rules 961–977 are removed to consolidate inter partes reexamination appeal information in part 41.

Rule 979 is amended by changing its title to "Return of Jurisdiction from the Board of Patent Appeals and Interferences; termination of proceedings" to reflect the two paragraphs of this section. Most of the subject matter of current paragraphs (a)–(g) is moved to §§ 41.79, 41.81 and 41.83. Paragraph (a) is amended to recite that jurisdiction over an inter partes reexamination proceeding passes to the examiner after a decision by the Board of Patent Appeals and Interferences upon transmittal of the file to the examiner, subject to each appellant's right of appeal or other review, for such further action as the condition of the inter partes reexamination proceeding may require, to carry into effect the

decision of the Board of Patent Appeals and Interferences. Paragraph (b) is amended to state that upon decision on the appeal before the Board of Patent Appeals and Interferences, if no further appeal has been taken (Rule 983), the inter partes reexamination proceeding will be terminated and the Director will issue a certificate under Rule 997.

Rule 981 is amended by changing its title to "Reopening after a final decision of the Board of Patent Appeals and Interferences" to better reflect the substance of the section and to clarify that it applies when a decision by the Board of Patent Appeals and Interferences on appeal has become final for judicial review.

Under 37 CFR 5.3, no interference will be declared with an application under a national secrecy order.

In the enrollment and discipline rules, 37 CFR 10.23(c)(7) and 11.6(d) are amended to change the cross-references to the interference rules.

A new part 41 consolidates rules relating to Board practice and simplifies reference to such practices. The Board will continue the practice used in part 1 of this title of citing sections without the part number. In proceedings before the Board, a party may cite "§ 41.x" as "Board Rule x".

Subpart A states policies, practices, and definitions common to all proceedings before the Board.

Section 41.1 sets forth general principles for part 41. Section 41.1(a) defines the scope of rules. Section 41.1(b) mandates that the Board's rules be construed to achieve just, speedy, and inexpensive resolutions of all Board proceedings, following the model of Rule 601 and Federal Rule of Civil Procedure 1. Section 41.1(c) explicitly extends the requirement for decorum under Rule 3 to Board proceedings, including dealings with opposing parties.

Section 41.2 sets forth definitions for Board proceedings under part 41. The preamble to § 41.2 is based on the preamble of Rule 601, which cautions that context may give a defined word a different meaning.

The definition of "Board" covers three distinct situations. First, for the purposes of a final agency action committed to a panel of Board members, the definition is identical in scope to 35 U.S.C. 6(b). Second, the definition includes action by the Chief Administrative Patent Judge in matters delegated in these rules to the Chief Administrative Patent Judge. Third, the definition recognizes that non-final actions are often performed by officials other than a panel or the Chief Administrative Patent Judge.

The definition of "Board member" follows the definition in 35 U.S.C. 6(a), under which the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, the Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office, the Commissioner for Patents, and the Commissioner for Trademarks are ex officio members of the Board.

The phrase "contested case" includes patent interferences (35 U.S.C. 135(a)) and proceedings with interference-based procedures (42 U.S.C. 2182 and 2457(d)).

The term "final" is defined pursuant to 5 U.S.C. 704 to assist parties in determining when a Board action is ripe for judicial review.

The definition of "hearing" reflects the holding of In re Bose Corp., 772 F.2d 866, 869, 227 USPQ 1, 4 (Fed. Cir. 1985) that a party is entitled to judicial consideration of properly raised issues, but is not entitled to an oral argument or consideration of improperly raised issues.

The definitions of "panel" and "panel proceeding" reflects the minimum quorum established in 35 U.S.C. 6(b), which reserves action on patentability and priority to panels. 35 U.S.C. 6(b).

The term "party" sets forth a generic term for entities acting in a Board proceeding.

The delegation of petition authority to the Chief Administrative Patent Judge in § 41.3(a) is new as a rule, but follows a delegation already published in the Manual of Patent Examining Procedure (MPEP) at § 1002.02(f).

Under § 41.3(b)(1) decisions committed by statute to the Board are not subject to petitions for supervisory review. Review of such decisions come through a request for rehearing or through judicial review. The provision in § 41.3(b)(2) for petitions in contested cases to be decided by other officials reflects the MPEP's designation of other actions typical in the ordinary course of Board proceedings as "petitions". See MPEP § 1002.02(g) (various procedural decisions in interferences).

Section 41.3(c) reflects current practice in requiring payment of a standard petition fee.

Section 41.3(d) reflects the current practice of not staying any action for a petition for supervisory review in Rule 181(f).

Section 41.3(e) sets times for filing petitions. As with Rule 181(f), failure to file a timely petition is sufficient basis for dismissing or denying a motion.

Section 41.4(a) and (b) follow the requirements of Rules 136(b) and 645 in providing rules for extensions of time and for acceptance of untimely papers. Section 41.4(c) points parties to timeliness rules that are related to Board proceedings, but not within the scope of the Board rules.

Section 41.5 provides a limited delegation to the Board under 35 U.S.C. 2(b)(2) and 32 to regulate the conduct of counsel in Board proceedings. Section 41.5(b) delegates to the Board the authority to conduct counsel disqualification proceedings while the Board has jurisdiction over a proceeding.

Section 41.6(a) relocates into part 41 the portions of Rule 14(e) that apply to the Board. Under § 41.6(a)(1) publicly available materials continue to be publicly available. Section 41.6(a)(2) sets forth the basis for making a determination under 35 U.S.C. 122(a) that special circumstances justify the publication of a Board action.

Section 41.6(b) generalizes to all Board proceedings the practice under Rule 11(e) of making the record of most interference proceedings publicly available eventually, although that availability might not occur until an involved patent application becomes available.

Section 41.7 recodifies the current practice of Rule 618 regarding duplicate papers and the expunging of papers, but generalizes it to all Board proceedings.

Section 41.8(a) reflects the practice under Rules 192(c)(1) and 602 regarding disclosure of the real parties-in-interest. Section 41.8(b) requires parties to provide notice of related proceedings.

Section 41.9 follows Rule 643 regarding action by an assignee to the exclusion of an inventor, but generalizes it to all Board proceedings.

Section 41.10 adds correspondence addresses for Board proceedings.

Section 41.11 codifies existing interference practice prohibiting ex parte communications about a contested case with an official actually conducting the proceeding, but generalizes the practice to include inter partes reexamination appeals as well.

Section 41.12 codifies existing interference practice regarding the citation of authority but generalizes the practice to all Board proceedings.

Section 41.20 consolidates the rules on fees associated with Board practice. Rules 22, 23, and 25–28, which govern fee practice before the Office generally, continue to apply in Board proceedings. Section 41.20(a) sets forth the petition fee, while paragraph (b) sets forth appeals-related fees.

Subpart B is added to set forth rules for the ex parte appeal under 35 U.S.C. 134 of a rejection in either a national

application for a patent, an application for reissue of a patent, or an ex parte reexamination proceeding to the Board.

Section 41.30 sets forth definitions for Board proceedings under subpart B of part 41. The preamble to § 41.30 is based on a similar provision in the preamble of former Rule 601. The term "proceeding" sets forth a generic term for a national application for a patent, an application for reissue of a patent, and an ex parte reexamination proceeding. The term "applicant" sets forth a generic term for either the applicant in a national application for a patent or the applicant in an application for reissue of a patent. The term "owner" sets forth a shorthand reference to the owner of the patent undergoing ex parte reexamination under Rule 510.

Section 41.31 is added to generally incorporate the requirements of former Rule 191(a)–(d). Paragraph (a) is subdivided into three parts to improve readability. Paragraph (d) is amended to refer only to the time periods referred to in paragraphs (a)(1)–(a)(3) of this section, while the current extension of time requirements for Rules 192, 193, 194, 196 and 197, formerly provided in Rule 191(e), is relocated to §§ 41.37, 41.41, 41.47, 41.50 and 41.52.

Section 41.33 is added to replace the requirements of former Rules 116 and 195. Paragraph (a) provides that amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) and prior to the date a brief is filed pursuant to § 41.37 may be admitted as provided in § 1.116. Thus, amendments after final but prior to appeal and amendments filed after appeal but prior to the date the brief is filed will be treated under the same standard (i.e, § 1.116). Paragraph (b) provides that amendments filed on or after the date of filing a brief pursuant to § 41.37 may be admitted: (1) to cancel claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, or (2) to rewrite dependent claims into independent form. A dependent claim is rewritten into independent form by including all of the limitations of the base claim and any intervening claims. Thus, no limitation of a dependent claim can be excluded in rewriting that claim into independent form. Paragraph (c) provides that all other amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i), 41.50(b)(1) and 41.50(c). Paragraph (d)(1) provides that affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) and prior to the date of filing a brief pursuant to § 41.37 may be admitted if the examiner determines that the affidavits or other evidence overcomes all rejections under appeal and that there is a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. Paragraph (d)(2) provides that all other affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i) and 41.50(b)(1). Paragraph (d) replaces the former practice of permitting such evidence based on a showing of good and sufficient reasons why such evidence was not earlier presented set forth in former Rule 195. The Office believes that prosecution should occur before the examiner prior to an appeal being filed, not after the case has been appealed pursuant to § 41.31(a)(1)–(a)(3).

Section 41.35 is added to generally incorporate the requirements of former Rule 191(e). In addition, this section makes clear that jurisdiction over an application may be relinquished by the Board and the application returned to the examining operation to permit processing to be completed by the examining operation before the Board takes up the appeal for decision. This is consistent with the present practice of returning an appealed application to the examining operation where some matter requiring attention has been identified prior to assignment of the appeal number and docketing of the appeal. In addition, the Board is permitted to take other appropriate action to complete the file.

Section 41.37 is added to generally incorporate the requirements of former Rule 192. In addition, the following changes have been made:

(1) The title of the section has been changed from "Appellant's brief" to "Appeal brief".

(2) In paragraph (a), one copy of the brief is required rather than three copies consistent with the Office's move to an electronic file wrapper.

(3) In paragraph (a), the brief is required to be filed within two months from the date of the notice of appeal under § 41.31 even if the time allowed for reply to the action from which the appeal was taken is later, which overall simplifies docketing of the due date.

(4) In paragraph (c)(1)(i), a statement is required in the brief identifying by name the real party in interest even if the party named in the caption of the brief is the real party in interest. This provides appellant the necessary mechanism for complying with § 41.8(a) in an appeal to the Board.

(5) In paragraph (c)(1)(ii), identification is required of all other prior and pending appeals, interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal, as well as to set forth a mechanism for complying with § 41.8(b) in an appeal to the Board.

(6) In paragraph (c)(1)(iii), both a statement of the status of all the claims in the proceeding (*e.g.*, rejected, allowed or confirmed, withdrawn, objected to, canceled) and an identification of those claims that are being appealed is required.

(7) In paragraph (c)(1)(v), a concise explanation of the invention is required for each of the independent claims involved in the appeal, which explanation shall refer to the specification by page and line number, and to the drawings, if any, by reference characters. For each independent claim involved in the appeal and for each dependent claim argued separately under the provisions of paragraph (c)(1)(vii) of this section, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The former requirement of Rule 192(c)(5) to set forth a concise explanation of the invention defined in the claims involved in the appeal by reference to the specification by page and line number, and to the drawings, if any, by reference characters was not being followed in a great number of briefs before the Board.

(8) In paragraph (c)(1)(vi), a concise statement listing each ground of rejection presented for review is required rather than issues for review. An example of a concise statement is "Claims 1 to 10 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. X."

(9) The grouping of claims requirement set forth in former Rule 192(c)(7) is removed. The general purpose served by former Rule 192(c)(7) is addressed in § 41.37(c)(1)(viii). The existing grouping of claims requirement has led to many problems such as (i) Grouping of claims across multiple rejections (*e.g.*, claims 1–9 rejected under 35 U.S.C. 102 over A while claims 10–15 are rejected under 35 U.S.C. 103 over A and the appellant

states that claims 1–15 are grouped together); (ii) Claims being grouped together but argued separately (*e.g.*, claims 1–9 rejected under 35 U.S.C. § 102 over A, the appellant groups claims 1–9 together but then argues the patentability of claims 1 and 5 separately); and (iii) examiners disagreeing with the appellant's grouping of claims.

(10) In paragraph (c)(1)(vii), any arguments or authorities not included in the brief or a reply brief filed pursuant to § 41.41 will be refused consideration by the Board, unless good cause is shown (requirement found in former Rule 192(a)), and a separate heading is required for each ground of rejection in place of the previous grouping of claims section of the brief. For each ground of rejection applying to two or more claims, the claims may be argued separately or as a group. When an appellant argues as a group multiple claims subject to the same ground of rejection, the Board may select a single claim from that group of claims and treat its disposition of a ground of rejection of that claim as applying to the disposition of that ground of rejection of all claims in the group of claims. Notwithstanding any other provision of this paragraph, an appellant's failure to argue separately claims that the appellant has grouped together constitutes a waiver of any argument that the Board must consider the patentability of any grouped claim separately. *See In re McDaniel*, 293 F.3d 1379, 1384, 63 USPQ2d 1462, 1465–66 (Fed. Cir. 2002) (interpreting former Rule 192(c)(7) to require separate treatment of separately rejected claims). Any claim argued separately should be placed under a subheading identifying the claim by number and claims argued as a group should be placed under a subheading identifying the claims by number. For example, if Claims 1 to 5 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. Y and appellant is only going to argue the limitations of independent claim 1, and thereby group dependent claims 2 to 5 to stand or fall with independent claim 1, then one possible heading as required by this subsection could be *Rejection under 35 U.S.C. 102(b) over U.S. Patent No. Y* and the optional subheading would be Claims 1 to 5. As another example, where claims 1 to 3 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. Z and the appellant wishes to argue separately the patentability of each claim, a possible heading as required by this subsection could be *Rejection under 35 U.S.C. 102(b) over U.S. Patent No. Z*, and the optional subheadings would be *Claim 1*, *Claim 2*, and *Claim 3*. Under each subheading the appellant would present the argument for patentability of that claim.

(11) Paragraph (c)(1)(vii) states that "Merely pointing out differences in what the claims cover is not an argument as to why the claims are separately patentable", a statement in slightly different form appeared in former Rule 192(c)(7).

(12) Paragraph (c)(1)(vii) eliminates subparagraphs (i) through (v) of former Rule 192(c)(8) which related to the manner in which arguments were to be made. Although they provided useful advice as to what an effective argument ought to include, these provisions have often been ignored by appellants and, for the most part, have not been enforced as set forth in paragraph (d) of that rule.

(13) Paragraph (c)(1)(ix) is added to require appellant to include an evidence appendix of any evidence relied upon by appellant in the appeal with a statement setting forth where that evidence was entered in the record by the examiner so that the Board will be able to easily reference such evidence during consideration of the appeal.

(14) Paragraph (c)(1)(x) is added to require appellant to include a related proceedings appendix containing copies of decisions rendered by a court or the Board in any proceeding identified pursuant to paragraph (c)(1)(ii) of this section so that the Board can take into consideration such decisions.

(15) Paragraph (c)(2) is added to exclude any new or non-admitted amendment, affidavit or other evidence from being included in the brief.

(16) Paragraph (d) is added to provide that appellants will be notified of reasons for non-compliance and given a period of time to file an amended brief.

(17) Paragraph (e) is added to provide notice that the periods set forth in this section are extendable under the provisions of Rule 136 for patent applications and Rule 550(c) for ex parte reexamination proceedings. This provision appeared in former Rule 191(d).

Section 41.39 is added to generally incorporate requirements found in former Rule 193(a).

Section 41.39(a)(2) is added to permit a new ground of rejection to be included in an examiner's answer eliminating the former prohibition of new grounds of rejection in examiner's answers. Many appellants are making new arguments for the first time in their appeal brief (apparently stimulated by a former change to the appeal process that inserted the prohibition on new grounds of rejection in the examiner's answer). Because the current appeal rules only allow the examiner to make a new ground by reopening prosecution, some examiners have allowed cases to go forward to the Board without addressing the new arguments. Thus, the revision would improve the quality of examiner's answers and reduce pendency by providing for the inclusion of the new ground of rejection in an examiner's answer without having to reopen prosecution. By permitting examiners to include a new ground of rejection in an examiner's answer, newly presented arguments can now be addressed by a new ground of rejection in the examiner's answer when appropriate. Furthermore, if new arguments can now be addressed by the examiner by incorporating a new ground of rejection in the examiner's answer, the new arguments may be able to be addressed without reopening prosecution and thereby decreasing pendency.

It is envisioned that new grounds of rejection in examiner's answers would be rare, rather than a routine occurrence. The Office plans to issue instructions that will be incorporated into the MPEP requiring that any new ground of rejection made by an examiner in an answer must be personally approved by a Technology Center Director or designee and that any new ground of rejection made in an answer be prominently identified as such. It is the further intent of the Office to provide guidance to examiners that will also be incorporated into the MPEP as to what circumstances, *e.g.*, responding to a new argument or new evidence submitted prior to appeal, would be appropriate for entry of a new ground of rejection in an examiner's answer rather than the reopening of prosecution. Where, for example, a new argument(s) or new evidence cannot be addressed by the examiner based on the information then of record, the examiner may need to reopen prosecution rather than apply a new ground of rejection in an examiner's answer to address the new argument(s) or new evidence.

Paragraph (b) of § 41.39 is added to set forth the responses an appellant may make when an examiner's answer sets forth a new ground of rejection. Appellant is required within two months from the date of the examiner's answer containing a new ground of rejection either:

(1) To request that prosecution be reopened by filing a reply under Rule 111 with or without amendment or submission of affidavits (Rules 130, 131 or 132) or other evidence, which would

result in prosecution being reopened before the examiner, or

(2) To file a reply brief under § 41.41, which would act as a request that the appeal be maintained. Such a reply brief could not be accompanied by any amendment, affidavit (Rules 130, 131, or 132) or other evidence. If such a reply brief were accompanied by any amendment or evidence, it would be treated as a request that prosecution be reopened before the examiner under paragraph (b)(1) of this section. Any reply brief would have to specify the error in each new ground of rejection as set forth in § 41.37(c)(1)(viii) and should generally follow the other requirements of a brief set forth in § 41.37(c).

If in response to the examiner's answer containing a new ground of rejection, appellant decides to reopen prosecution of the application before the examiner, the Office will treat the decision to reopen prosecution also as a request to withdraw the appeal. If appellant fails to exercise one of the two options within two months from the date of the examiner's answer, the appeal will be sua sponte dismissed (*i.e.*, terminated) as to the claims subject to the new ground of rejection.

Paragraph (c) of § 41.39 is added to provide notice that the period set forth in paragraph (b) of this section is extendable under the provisions of Rule 136(b) for patent applications and Rule 550(c) for ex parte reexamination proceedings. This provision appeared in former Rule 191(d).

Section 41.41 is added to generally incorporate requirements found in former Rule 193(b). In addition:

(1) Paragraph (a)(2) is added to make explicit that a reply brief cannot include any new or non-admitted amendment, affidavit or other evidence.

(2) Paragraph (b) is added to make clear that a reply brief not in compliance with paragraph (a) would not be considered. The examiner would notify the appellant in this event.

(3) Paragraph (c) is added to provide notice that the period set forth in this section would be extendable under the provisions of Rule 136(b) for patent applications and Rule 550(c) for ex parte reexamination proceedings. This provision appeared in former Rule 191(d).

Section 41.43 is added to permit the examiner to furnish a supplemental examiner's answer to respond to any new issue raised in the reply brief. This would dispense with the need for the Board to remand the proceeding to the examiner to treat any new issue raised in the reply brief. The MPEP will provide that each supplemental examiner's answer must be approved by a Technology Center Director or designee. A supplemental examiner's answer may not include a new ground of rejection. If a supplemental examiner's answer is furnished by the examiner, the appellant is permitted to file another reply brief under § 41.41 within two months from the date of the supplemental examiner's answer.

The former prohibition against a supplemental examiner's answer in other than a remand situation is removed to permit use of supplemental examiner's answers where the examiner is responding only to new issues raised in the reply brief. As a consequence, the requirements pertaining to appellants when prosecution is reopened under former Rule 193(b)(2) are removed.

Section 41.43(a)(1) permits the examiner to furnish a supplemental examiner's answer to respond to any new issue raised in a reply brief. It should be noted that an indication of a change in status of claims (*e.g.*, that certain rejections have been withdrawn as a result of a reply brief) is not a supplemental examiner's answer and therefore would not give appellant the right to file a reply brief. Such an indication of a change in status may be made on form PTOL–90. The Office will develop examples to help the examiner determine what would or would not be considered a new issue warranting a supplemental examiner's answer. An appellant who disagrees with an examiner's decision that a supplemental examiner's answer is permitted under this rule may petition for review of the decision under Rule 181. Examples of new issues raised in a reply brief include the following:

Example 1: The rejection is under 35 U.S.C. 103 over A in view of B. The brief argues that element 4 of reference B cannot be combined with reference A as it would destroy the function performed by reference A. The reply brief argues that B is nonanalogous art and therefore the two references cannot be combined.

Example 2: Same rejection as in Example 1. The brief argues only that the pump means of claim 1 is not taught in the applied prior art. The reply brief argues that the particular retaining means of claim 1 is not taught in the applied prior art.

Paragraph (a)(1) of § 41.43 also sets forth the ability of the examiner to withdraw the final rejection and reopen prosecution as an alternative to the use of a supplemental examiner's answer. The primary examiner's decision to withdraw the final rejection and reopen prosecution to enter a new ground of rejection requires approval from the supervisory patent examiner as currently set forth in MPEP 1208.02.

Paragraph (b) of § 41.43 permits appellant to file a supplemental reply brief in response to a supplemental examiner's answer within two months from the date of the supplemental examiner's answer. That two-month time period may be extended under the provisions of Rule 136(b) for patent applications and Rule 550(c) for ex parte reexamination proceedings as set forth in § 41.43(c).

Section 41.47 is added to generally incorporate the requirements of former Rule 194. In addition:

(1) Paragraph (b) requires the separate paper requesting the oral hearing to be captioned "REQUEST FOR ORAL HEARING" and sets forth that such a request can be filed within two months from the date of the examiner's answer or supplemental examiner's answer.

(2) Paragraph (d) is added to set forth the procedure for handling the request for oral hearing when an appellant has complied with all the requirements of paragraph (b) of this section. Since notice to the primary examiner is a matter internal to the Office, the requirement for notice to the primary examiner has been removed from the rule. It is anticipated that the primary examiner will be sent notice of the hearing time and date by e-mail.

(3) Paragraph (e)(1) is added to specifically provide that at the oral hearing (i) appellant may only rely on evidence that has been previously considered by the primary examiner and present argument that has been relied upon in the brief or reply brief except as permitted by paragraph (e)(2) of this section; (ii) the primary examiner may only rely on argument and evidence raised in the answer or a supplemental answer except as permitted by paragraph (e)(2) of this section; and (iii) that appellant opens and concludes the argument (*i.e.*, the order of the argument at the hearing is: Appellant opens, then the primary examiner argues, then the appellant concludes presuming that appellant has reserved some time for a concluding argument).

(4) Paragraph (e)(2) is added to specifically provide that upon a showing of good cause, appellant and/or the primary examiner may rely on a new argument based upon a recent relevant decision of either the Board or a Federal Court.

(5) Paragraph (f) is added to incorporate the substance found in former Rule 194. Exemplary situations where the Board may decide no hearing is necessary include those where the Board has become convinced, prior to hearing, that an application must be

remanded for further consideration prior to evaluating the merits of the appeal or that the examiner's position cannot be sustained in any event.

(6) Paragraph (g) is added to provide notice that the periods set forth in this section are extendable under the provisions of Rule 136(b) for patent applications and Rule 550(c) for ex parte reexamination proceedings. This provision appeared in former Rule 191(d).

Section 41.50 is added to generally incorporate the requirements of former Rule 196. In addition:

(1) Paragraph (a)(1) explicitly provides that the Board, in its principal role under 35 U.S.C. 6(b) of reviewing adverse decisions of examiners, may in its decision affirm or reverse the decision of the examiner in whole or in part on the grounds and on the claims specified by the examiner. The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed. The Board may also remand an application to the examiner.

(2) Paragraph (a)(2) is added to require appellant to respond to any supplemental examiner's answer issued in response to a remand from the Board to the examiner for further consideration of a rejection to avoid sua sponte dismissal of the appeal as to the claims subject to the rejection for which the Board has remanded the proceeding. Appellant must exercise one of the following two options to avoid such sua sponte dismissal of the appeal as to the claims subject to the rejection for which the Board has remanded the proceeding: (i) Request that prosecution be reopened before the examiner by filing a reply under Rule 111 with or without amendment or submission of affidavits (Rules 130, 131 or 132) or other evidence, or (ii) request that the appeal be maintained by filing a reply brief as provided in § 41.41. If such a reply brief is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the examiner under § 41.50(a)(2)(i). Any request that prosecution be reopened under this paragraph would be treated as a request to withdraw the appeal.

(3) Paragraph (b)(2) eliminates the provision relating to requests that the application or patent under ex parte reexamination be reheard, since that provision is included in § 41.52(a).

(4) Paragraph (c) provides that the opinion of the Board may include an explicit statement how a claim on appeal could be amended to overcome a specific rejection and that when the opinion of the Board included such a statement, appellant would have the right to amend in conformity therewith. Such an amendment in conformity with such statement would overcome the specific rejection, but an examiner could still reject a claim so-amended, provided that the rejection constituted a new ground of rejection.

(5) Paragraph (d) provides that appellant's failure to timely respond to an order of the Board of Patent Appeals and Interferences could result in the dismissal of the appeal.

(6) Paragraph (f) is added to provide notice that the periods set forth in this section are extendable under the provisions of Rule 136(b) for patent applications and Rule 550(c) for ex parte reexamination proceedings. This provision appeared in former Rule 191(d).

Section 41.52 is added to generally incorporate the requirements of former Rule 197(b). In addition, paragraph (a)(1) incorporates the matter from former Rule 196(b)(2) relating to the request that the application or patent under ex parte reexamination be reheard. Arguments not raised in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) and (a)(3) of this section. In addition, the rule would permit the Board to simply deny a request for rehearing in appropriate cases rather than rendering a new opinion and decision on the request for rehearing. Paragraph (a)(2) provides that upon a showing of good cause, appellant may present a new argument based upon a recent relevant decision of either the Board or a Federal Court. Paragraph (a)(3) provides that new arguments responding to a new ground of rejection made pursuant to § 41.50(b) are permitted. Paragraph (b) is added to provide notice that the period set forth in this section is extendable under the provisions of Rule 136(b) for patent applications and Rule 550(c) for ex parte reexamination proceedings. This provision appeared in former Rule 191(d).

Section 41.54 is added to generally incorporate the requirements of former Rule 197(a).

Subpart C is added to provide rules for the inter partes appeal under 35 U.S.C. 315 of a rejection in an inter partes reexamination proceeding to the Board. This subpart does not apply to any other Board proceeding and is strictly limited to appeals in inter partes reexamination proceedings filed under 35 U.S.C. 311.

Section 41.60 sets forth definitions for Board proceedings under subpart C of part 41. The preamble to § 41.60 is based on a similar provision in the preamble of former Rule 601. The term "proceeding" provides a shorthand reference to an inter partes reexamination proceeding. The term "owner" provides a shorthand reference to the owner of the patent undergoing inter partes reexamination under Rule 915. The term "requester" provides a generic term to describe each party other than the owner who requested that the patent undergo inter partes reexamination under Rule 915. The term "appellant" provides a generic term for any party, whether the owner or a requester, filing a notice of appeal or cross appeal under § 41.61. If more than one party appeals or cross appeals, each appealing or cross appealing party is an appellant with respect to the claims to which his or her appeal or cross appeal is directed. The term "respondent" provides a generic term for any requester responding under § 41.68 to the appellant's brief of the owner, or the owner responding under § 41.68 to the appellant's brief of any requester. No requester may be a respondent to the appellant brief of any other requester. The terms "appellant" and "respondent" were defined in former Rule 962. The definition of the term "filing" provides a generic requirement that any document filed in the proceeding by any party must include a certificate indicating service of the document to all other parties to the proceeding as required by Rule 903.

Section 41.61 is added to generally incorporate the requirements of former Rule 959.

Sections 41.63(a) and (b) are added to replace the requirements of former Rule 116 with a prohibition of amendments submitted after the date the proceeding has been appealed pursuant to § 41.61, except for amendments permitted by § 41.77(b)(1) and amendments canceling claims where such cancellation does not affect the scope of any other pending claim in the proceeding. Section 41.63(c) replaces the requirements of former Rule 975 with a prohibition on the admission of affidavits and other evidence submitted after the case has been appealed pursuant to § 41.61 except as permitted by § 41.77(b)(1). This replaces the current practice of permitting such evidence based on a showing of good and sufficient reasons why such evidence was not earlier presented. The Office believes that prosecution of an application should occur before the examiner prior to an appeal being filed, not after the case has been appealed pursuant to § 41.61.

Section 41.64 is added to generally incorporate the requirements of former Rule 961, but would make clear that jurisdiction over a proceeding may be relinquished and the proceeding returned to the examining operation to permit processing to be completed before the Board takes up the appeal for decision.

Section 41.66 is added to generally incorporate the requirements of former Rule 963.

Section 41.67 is added to generally incorporate the requirements of former Rule 965. In addition:

(1) In paragraph (a), one copy of the brief is required rather than three copies consistent with the Office's move to an electronic file wrapper.

(2) In paragraph (c)(1)(i), a statement in the brief is required identifying by name the real party in interest even if the party named in the caption of the brief is the real party in interest. This provides appellant the necessary mechanism of complying with § 41.8(a) in an appeal to the Board;

(3) In paragraph (c)(1)(ii), clear identification is required of all other prior and pending appeals, interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal, as well as to provide a mechanism of complying with § 41.8(b) in an appeal to the Board.

(4) In paragraph (c)(1)(iii), both a statement of the status of all the claims in the proceeding (*e.g.*, rejected, allowed or confirmed, withdrawn, objected to, canceled) and an identification of those claims that are being appealed is required.

(5) In paragraph (c)(1)(v), a concise explanation is required of the subject matter defined in each of the independent claims involved in the appeal and which concise explanation shall refer to the specification by page and line number, and to the drawings, if any, by reference characters. For each independent claim involved in the appeal and each dependent claim argued separately under the provisions of paragraph (c)(1)(vii) of this section, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters.

(6) In paragraph (c)(1)(vi), a concise statement is required listing each issue presented for review. An example of a concise statement is claims 1 to 10 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. X.

(7) The grouping of claims requirement set forth in former Rule 965(c)(7) is removed. The general purpose served by former Rule 965(c)(7) is addressed in § 41.67(c)(1)(viii). The existing grouping of claims requirement has led to many problems as set forth above in the discussion of § 41.37.

(8) In paragraph (c)(1)(vii), any arguments or authorities not included in a brief permitted in this section or filed pursuant to §§ 41.68 and 41.71 will be refused consideration by the Board, unless good cause is shown, and a separate heading is required for each ground of rejection in place of the previous grouping of claims section of the brief. For each ground of rejection applying to two or more claims, the claims may be argued separately or as a group. When an appellant argues as a group multiple claims subject to the same ground of rejection, the Board may select a single claim from that group of claims and treat its disposition of a ground of rejection of that claim as applying to the disposition of that ground of rejection of all claims in the group of claims. Notwithstanding any other provision of this paragraph, an appellant's failure to argue separately claims that appellant has grouped together would constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately. *See In re McDaniel,* 293 F.3d 1379, 1384, 63 USPQ2d 1462, 1465–66 (Fed. Cir. 2002) (interpreting analogous former Rule 192(c)(7) to require separate treatment of separately rejected claims). Any claim argued separately should be placed under a subheading identifying the claim by number and that claims argued as a group should be placed under a subheading identifying the claims by number.

(9) Paragraph (c)(1)(vii) states that "Merely pointing out differences in what the claims cover is not an argument as to why the claims are separately patentable." This statement in slightly different form appeared in former Rule 965(c)(7).

(10) Paragraph (c)(1)(vii) eliminates subparagraphs (i) through (v) of former Rule 965(c)(8) which related to the manner in which arguments were to be made. Although providing useful advice as to what an effective argument ought to include, these provisions have often been ignored by appellants and, for the most part, have not been enforced as provided in former Rule 965(d).

(11) Paragraph (c)(1)(ix) is added to require appellant to include an evidence appendix of any evidence relied upon by appellant in the appeal with a statement setting forth where that evidence was entered in the record by the examiner so that the Board would be able to reference such evidence easily during their consideration of the appeal.

(12) Paragraph (c)(1)(x) is added to require appellant to include a related proceedings appendix containing copies of decisions rendered by a court or the Board in any proceeding identified pursuant to § 41.67(c)(1)(ii) so that the Board can take into consideration such decisions.

(13) Paragraph (c)(2) is added to exclude any new or non-admitted amendment, affidavit or other evidence from being included in an appellant's brief.

Section 41.68 is added to generally incorporate requirements found in former Rule 967 and changes similar to those in § 41.67. In addition, paragraph (b)(2) excludes any new or non-admitted amendment, affidavit or other evidence from being included in a respondent's brief.

Section 41.69 is added to generally incorporate requirements found in former Rule 969.

Section 41.71 is added to generally incorporate requirements found in former Rule 971.

Section 41.73 is added to generally incorporate the requirements of former Rule 973. In addition:

(1) Paragraph (b) requires the separate paper requesting the oral hearing to be captioned "REQUEST FOR ORAL HEARING" and that such a request can be filed within two months from the date of the examiner's answer.

(2) Paragraph (d) is added to provide the procedure for handling the request for oral hearing in which a party has complied with all the requirements of paragraph (b) of this section. Since notice to the primary examiner is a matter internal to the Office, the requirement for notice to the primary examiner has been removed from the rule. It is anticipated that the primary examiner will be sent notice of the hearing time and date by e-mail.

(3) Paragraph (e)(1) is added to specifically provide that at the oral hearing (i) parties may only rely on evidence that has been previously considered by the primary examiner and present argument that has been relied upon in the briefs except as permitted by paragraph (e)(2) of this section; (ii) the primary examiner may only rely on argument and evidence relied upon in the answer except as permitted by paragraph (e)(2) of this section; and (iii)

that the Board will determine the order of the arguments presented at the oral hearing.

(4) Paragraph (e)(2) is added to specifically provide that upon a showing of good cause, appellant, respondent and/or the primary examiner may rely on a new argument based upon a recent relevant decision of either the Board or a Federal Court.

(5) Paragraph (f) is added to incorporate the substance found in former Rule 194. Exemplary situations where the Board might decide no hearing is necessary include those where the Board has become convinced, prior to hearing, that the proceeding must be remanded for further consideration prior to evaluating the merits of the appeal.

Section 41.77 is added to generally incorporate the requirements of former Rule 977.

Section 41.79 is added to generally incorporate the requirements of former Rule 979 concerning rehearing before the Board. Paragraph (b) generally incorporates the requirements of former Rule 979(d). Arguments not raised in the briefs before the Board and evidence not previously relied upon in the briefs are not permitted in the request for rehearing except as permitted by paragraphs (b)(2) and (b)(3) of this section. Paragraph (b)(2) provides that upon a showing of good cause, appellant and/or respondent may present a new argument based upon a recent relevant decision of either the Board or a Federal Court. Paragraph (b)(3) provides that new arguments responding to a new ground of rejection made pursuant to § 41.77(b) are permitted. Paragraph (c) generally incorporates the requirements of former Rule 979(b). Paragraph (d) generally incorporates the requirements of former Rule 979(c). Paragraph (e) generally incorporates the requirements of former Rule 979(g).

Section 41.81 is added to generally incorporate the requirements of former Rule 979(e).

Subpart D provides rules for contested cases before the Board. Contested cases are predominantly patent interferences under 35 U.S.C. 135(a), but also include United States Government ownership contests under 42 U.S.C. 2182(3) and 2457(d).

Section 41.100 defines two terms. The term "business day" is defined in a manner consistent with 35 U.S.C. 21(b) to exclude Saturday, Sunday, and Federal holidays, when the closure of the Board may affect the Board's, or a party's, ability to perform an action.

The term "involved" appears in 35 U.S.C. 135(a) with respect to claims and is implicitly defined in Rule 601(f) (for claims) and in Rule 601(l) (for applications), but is not explicitly defined in the current rules. The rule expressly defines "involved" as designating any patent application, patent, or claim that is the subject of the contested case.

Section 41.101 follows the practice in Rule 611(a) and (b) for notifying parties of a contested case. As a courtesy, the Board will make reasonable efforts to provide notice to all parties. Failure to maintain a current correspondence address may result in adverse consequences.

Section 41.102 requires completion of examination for most applications (and of reexamination for most patents) before the Board will institute a contested case.

Section 41.103 follows the file jurisdiction practice in Rules 614 and 615 except to generalize the temporary transfer of jurisdiction to include parts of the Office other than the examining corps, including, for example, the Office of Public Records. Such transfers of jurisdiction will generally be for short periods and for limited purposes.

Section 41.104(a) follows the practice of Rule 610(e), which permits an administrative patent judge wide latitude in administering interferences. The decision to waive a procedural requirement is committed to the discretion of the administrative patent judge.

Section 41.104(c) clarifies that any default times set by rule may be changed by order. "Times" in paragraph (c) includes both dates and durations.

Section 41.106 provides guidance for the filing and service of papers. Under § 41.106(a), papers to be filed are required to meet standards very similar to those required in patent prosecution, Rule 52(a), and in filings in the Court of Appeals for the Federal Circuit, Fed. R. App. P. 32. Section 41.106(a)(1) would permit a party to file papers in either A4 format or 8½-inch × 11-inch format, but not to alternate between formats. At present, the Board prefers papers to be filed in 8½-inch × 11-inch format because the present filing system is best adapted to this paper format.

Section 41.106(b) provides guidance specific to papers other than exhibits. Section 41.106(b)(1) codifies current practices for the cover sheet of a paper. Section 41.106(b)(2) requires holes at the top of the paper consistent with Local Civil Rule 5.1(f) (1999) of the United States District Court for the District of Columbia to facilitate entry of the paper in the administrative record. The bar in § 41.106(b)(3) against incorporation by reference and combination of papers minimizes the chance that an argument will be overlooked and reduces abuses that arise from incorporation and combination.

Section 41.106(c) requires the filing of a working copy for the Board official administering the proceeding.

Section 41.106(d) provides additional guidance for special modes of filing. Section 41.106(d)(1) encourages the use of the EXPRESS MAIL® service of the United States Postal Service. Section 41.106(d)(2) permits other modes of filing.

Section 41.106(e)(1) requires papers to be served when they are filed if they have not already been served. Section 41.106(e)(3) provides for expedited service.

Section 41.106(f) provides rules for certificates of service. Section 41.106(f)(1) requires the certificate to be incorporated into each paper other than exhibits. When the exhibits are filed at the same time, the certificate may be incorporated into the exhibit list. See § 41.154(d).

Section 41.108 requires each party to identify its counsel, if any. The rule also follows Rule 613(a), which permitted the Board to require the appointment of a lead counsel.

Section 41.109 follows Rule 612 in permitting parties to obtain copies of certain Office files directly related to the contested case. Section 41.109(c) requires a party that has not received copies of a requested file to notify the Board of the problem promptly.

Section 41.110(a) requires a single clean set of the claims, analogous to the requirement for amendments "in clean form" in Rule 121.

Section 41.120 provides for notice of requested relief and the basis for that relief in contested cases.

Section 41.121(a)(1) redefines motions practice under Rule 633(a), (b), (c)(2), (c)(3), (c)(4), (f) and (g) to focus more specifically on the central issue in the contested case. Section 41.121(a)(1)(iii) permits a motion for judgment in the contest, which can include an attack on standing as well as a motion for relief on the central issue of the contest. Section 41.121(a)(2) and (a)(3) modifies the responsive motion and miscellaneous motion practice under Rules 633(i) and (j), 634, and 635 to ensure that the proceeding remains focused. Section 41.121(a)(3) provides for miscellaneous motions, which would offer a mechanism for requesting relief on procedural issues and other issues tangential to patentability and priority.

Section 41.121(b) places the burden of proof on the moving party, following Rule 637(a) (2003).

Section 41.121(c)(1) follows Rule 637(a) regarding the general contents of motions, but would also codify the current practice of requiring a separate paper for each motion. The numbered paragraphs stating material facts in § 41.121(c)(1)(ii) should be short, ideally just a sentence or two, to permit the opposing party to admit or deny each fact readily. Under § 41.121(c)(1)(iii), sloppy motion drafting is held against the moving party. Section 41.121(c)(2) requires the movant to make showings ordinarily required for the requested relief in other parts of the Office.

Section 41.121(d) allows the Board to raise questions of patentability.

Section 41.122 codifies the present practice regarding new arguments in replies.

Section 41.123(a) sets default times for filing motions. Section 41.123(b) provides requirements for miscellaneous motions.

A party may request an oral argument under § 41.124(a), but requests would not be automatically granted. Section 41.124(b), requires the parties to file three working copies of the papers to be considered for the panel if the hearing is set for a panel. Section 41.124(c) provides a default time of 20 minutes per party for oral arguments at the Board because they are not evidentiary hearings. Section 41.124(d) permits the use of demonstrative exhibits. Section 41.124(e) permits the transcription of the argument.

Section 41.125(a) maintains the discretion under current practice to address issues in an order that is both fair and efficient. Section 41.125(b) clarifies the current practice that a decision short of judgment is not final. Section 41.125(c) recodifies the time for requesting rehearing from Rule 640(c) and the procedural requirements of the last two sentences of Rule 655(a).

Section 41.126 recodifies the current arbitration practice.

Section 41.127(a)(1) recodifies the existing estoppel provision for interferences. Section 41.127(a)(2) restates the final disposal provision of Rule 663. Section 41.127(b) restates the conditions in Rule 662 under which the Board infers a concession of the contest. Section 41.127(c) restates the recommendation provision of Rule 659. Section 41.127(d) provides a time for requesting a rehearing.

Section 41.128(a) restates Rule 616 on sanctions, but adds the examples of misleading arguments and dilatory tactics to the list of reasons for sanctions. Section 41.128(b) restates the list of sanctions provided in Rule 616, but adds a terminal disclaimer requirement as a sanction.

Section 41.150(a) restates the present policy of limited discovery, consistent with the goal of providing contested proceedings that are fast, inexpensive, and fair. Section 41.150(b) provides for automatic discovery of materials cited in the specification of an involved or benefit disclosure. Section 41.150(c) restates existing practice under Rule 687 regarding additional testimony.

Section 41.151 continues the practice under Rule 671(i) of making failure to comply with the rules a basis for challenging admissibility.

Section 41.152 continues the current practice of using the Federal Rules of Evidence in contested cases. Section 41.152(d) permits reliance on official notice and hearsay to determine the scope and effect of foreign law.

Section 41.153 restates the practice under Rule 671(d) of admitting Office records that are available to all parties without certification. Under § 41.154(a), each Office record cited as evidence would have to be submitted as an exhibit.

Section 41.154(a) restates Rule 671(a), which sets the form of evidence, and codifies the existing practice that all evidence must be submitted as an exhibit. Section 41.154(b) restates Rule 647 regarding translation of foreign language evidence. Section 41.154(c) sets forth additional formal requirements for exhibits consistent with current practice. An exhibit list is required under § 41.154(d).

Section 41.155 sets forth rules for objecting to evidence and responding to objections. Under § 41.155(b)(1), the default time for serving an objection to evidence other than testimony is five business days. Section 41.155(b)(2) permits a party that submitted evidence ten business days after service of the objection to cure any defect in the evidence. (Standing Order ¶ 14.2 provides two weeks.) The Board would not ordinarily address an objection unless the objecting party filed a motion to exclude under § 41.155(c). Section 41.155(d) provides for a motion in limine for a ruling on admissibility.

Section 41.156(a) requires a party seeking a subpoena to first obtain authorization from the Board. Section 41.156(b) imposes additional requirements on a party seeking testimony or production outside the United States because the use of foreign testimony generally increases the cost and complexity of the proceeding for both the parties and the Board.

Section 41.157 restates existing practice regarding the taking of testimony. The time period for cross-examination set in § 41.157(c)(2) follows the current practice and sets a norm for the conference held under § 41.157(c)(1). Section 41.157(c)(3) clarifies the practice of providing documents in advance by limiting the practice to direct testimony. Since direct testimony is generally in the form of a declaration, the circumstance in which § 41.157(c)(3) would apply should rarely occur apart from compelled testimony. Section 41.157(d) codifies the existing requirement for a conference before a deposition with an interpreter.

Section 41.157(e) adopts "officer", the term used in 35 U.S.C. 23, to refer to the person qualified to administer testimony. The certification of § 41.157(e)(6)(vi) substantially adopts the standard of Rule 674 for disqualifying an officer from administering a deposition. Section 41.157(e)(7) requires the proponent of the testimony to file the transcript of the testimony.

Section 41.157(f) codifies the existing practice of requiring the proponent of testimony to pay the reasonable costs associated with making the witness available for cross examination, including the costs of the reporter and transcript.

Section 41.158 codifies the current practice regarding expert testimony and scientific tests and data.

Subpart E provides rules specific to patent interferences. Section 41.200(a) would specifically identify patent interferences as contested cases subject to the rules in subpart D.

Section 41.200(b) continues the practice under Rule 633(a) of looking at the applicant's specification to determine the meaning of a copied claim, not the specification from which the claim was copied.

Section 41.200(c) sets forth the policy now found in Rule 610(c) setting two years as the maximum normal pendency for patent interferences.

Section 41.201 sets forth definitions specific to patent interferences. The phrase "accorded benefit" is defined as the Board's designation of an application as providing a proper constructive reduction to practice for a party.

A definition is set forth for the phrase "constructive reduction to practice" because this phrase is used in the rules instead of "earliest effective filing date" to explain more precisely how benefit is accorded for the purpose of determining priority.

The term "count" is redefined to emphasize the relationship of the count to admissible proofs of priority under § 102(g).

The definition of "involved claim" is based on a similar definition in Rule 601(f) and is consistent with the definition of "involved" for contested cases in § 41.100 because only claims that correspond to the count are at risk in an interference, except to the extent a question is raised as to whether a claim that does not correspond should.

The definition of "senior party" would depart from the current definition in Rule 601(m) by focusing on the earliest constructive reduction to practice to determine which party, if any, is senior.

The phrase "threshold issue" is defined to include three specific issues that directly affect whether a party may participate in an interference. The first identified threshold issue is no interference-in-fact. The other two specifically identified issues, the bar under 35 U.S.C. 135(b) and lack of written description under 35 U.S.C. 112(1), are directed to the prevention of spuriously provoked interferences and would consequently be limited to motions from a party with a patent or published application against a party with an involved application.

Section 41.202(a) restates the requirements of Rules 604, 607, and 608 for applicants provoking an interference. Section 41.202(a)(5) continues the practice under Rule 633(a) of looking at the applicant's specification to determine the meaning of a copied claim, not the specification from which the claim was copied.

Section 41.202(c) restates the practice under Rule 605 of requiring an applicant to add a claim to provoke an interference, but adds requirements for applicants copying claims from patents.

Section 41.202(d) sets forth the basis for a summary proceeding when an applicant does not appear to be able to show it would prevail on priority. Section 41.202(d)(1) restates Rule 608, but eliminates the distinction between Rule 608(a) and Rule 608(b). Section 41.202(d)(2) restates Rule 617 by providing a basis for a summary proceeding on priority when the applicant fails to make a sufficient showing of priority. Under § 41.202(e), the showing must by itself, if unrebutted, warrant a determination of priority favorable to the applicant.

Section 41.203(a) states the standard for declaring a patent interference. The Director uses a two-way unpatentability test to determine whether claimed inventions interfere. Under § 41.203(b) an administrative patent judge declares the interference. Section 41.203(c) authorizes an administrative patent judge to redeclare the interference sua sponte or in response to a decision on motions. Section 41.203(d) permits a party to suggest that an administrative patent judge exercise discretion to declare a new interference or to redeclare the existing interference to accommodate such files.

Section 41.204 would define notices of requested relief in interferences. Section 41.204(a) simplifies the formal requirements for the principal notice on priority, the preliminary statement (which is renamed a "priority statement"). Section 41.204(b) codifies the existing practice of requiring a list of motions, but under the rule a party would ordinarily be limited to filing substantive motions consistent with its notice of requested relief. No default times is set for statements in § 41.204(c).

Section 41.205 restates practice under Rule 666 regarding the filing of settlement agreements and would implement the requirements of 35 U.S.C. 135(c). Section 205(a) incorporates Rule 661. In addition, § 41.205(a) provides that after a final decision is entered by the Board, an interference is considered terminated when no appeal (35 U.S.C. 141) or other review (35 U.S.C. 146) has been or can be taken or had. If an appeal to the U.S. Court of Appeals for the Federal Circuit (under 35 U.S.C. 141) or a civil action (under 35 U.S.C. 146) has been filed the interference is considered terminated when the appeal or civil action is terminated. A civil action is terminated when the time to appeal the judgment expires. An appeal to the U.S. Court of Appeals for the Federal Circuit, whether from a decision of the Board or a judgment in a civil action, is terminated when the mandate is issued by the Court. Rule 41(d)(2), Fed. R. App. Procedure, controls when the mandate of the Court of Appeals will issue in the event that a party filed a petition for writ of certiorari to the United States Supreme Court. Unless a party petitioning for a writ of certiorari seeks and obtains a stay of the appellate court's mandate, proceedings will be considered terminated with the issuance of the mandate, as noted in § 41.205(a).

Section 41.206 revises practice regarding commonly owned patents and applications in an interference to address cases involving a real party-in-interest with the ability to control the conduct of more than one party.

Section 41.207(a)(1) recodifies the presumption regarding order of invention from Rule 657(a). Section 41.207(a)(2) recodifies the evidentiary standards for proving priority stated in Rule 657(b) and (c), but restates the standard of Rule 657(c) in terms of the date of the earliest constructive reduction to practice.

Section 41.207(b) clarifies claim correspondence practice and explicitly states the effect of claim correspondence. Section 41.207(b)(1) reflects current practice under which patentability must be determined for claims, not counts. Under § 41.207(b)(2), a claim would correspond to the count if the subject matter of the claim would have been anticipated by or obvious (alone or in combination with prior art) in view of the subject matter of the count.

The presumption in § 41.207(c) restates the presumption in Rule 637(a) that prior art cited against an opponent is presumed to apply against the movant's claims.

Section 41.208(a) focuses substantive motions on the core questions of priority.

Section 41.208(b) places the burden of proof on the movant and provides guidance on how to satisfy the burden of going forward.

Section 41.208(c)(1) requires a movant seeking to add or amend a claim to show that the added or amended claim is patentable. Section 41.208(c)(2) similarly requires a movant seeking to add or amend a count to show that the count does not include unpatentable subject matter.

Discussion of Comments

Generally

Unless otherwise indicated, rule references are to rules within chapter I of title 37, Code of Federal Regulations. Comments directed to formal errors in the proposed rule making have been gratefully considered, but will not be separately discussed.

Comment 1: One comment suggests that the Board rules are confusing because some of them apply to activities that take place before an examiner rather than during the Board proceeding itself. The comment suggests that such rules be restored to Part 1 rather than moved to Part 41 as proposed.

Answer: The problem identified is common to any set of rules covering transitions or interfaces between separate processes. For instance, the Federal Rules of Appellate Procedure (FRAP) provide directions to the clerk of the district court on what to do (FRAP 3) before the appeal is docketed (FRAP 12(a)). A choice must be made between keeping such rules with the patent prosecution rules, moving them to the Board rules, or even creating an additional part.

The best choice is to keep such rules with the Board rules. At least one such rule is triggered in relation to every Board proceeding. For instance, § 41.37

(appeal briefs) will be implicated in the majority of ex parte appeals to the Board. By contrast, a Board proceeding occurs in only about 1% of all applications. Consequently, the connection of the rules in question to Board practice is much stronger than the connection to prosecution. As a convenience to applicants and other users of the rules, § 1.191 and § 1.959 direct attention to appropriate subparts of Part 41.

Comment 2: One comment notes that § 1.1(a)(1)(iii), which provides an address for patent interference correspondence was removed but was not replicated in Part 41.

Answer: The interference address was located in proposed § 41.106(d). In view of the confusion that the proposed approach caused for the person making the comment, both § 1.1(a)(1)(ii) and § 1.1(a)(1)(iii) (and the address portion of § 41.106(d)) have been moved to a new § 41.10. Section 1.1(a)(1)(ii) has been rewritten to direct readers to § 41.10.

Comment 3: One comment notes that § 1.6(d)(9) and § 1.8(a)(2)(i)(B), which ban facsimiles and certificates of mailing in interferences, are removed. The comment suggests that the removal means these practices are now permitted.

Answer: Section 41.106 provides directions on filing papers with the Board in contested cases, including interferences. Sections 1.6(d)(9) and 1.8(a)(2)(i)(B) have been revised to direct readers to § 41.106.

Comment 4: One comment opposes moving § 1.14(e) to § 41.6 because the comment urges that this important function should remain under the control of the Director.

Answer: Several observations are in order. First, the rule is limited to Board actions, not all patent related matters. Second, the rule simply implements access that is already available under a variety of statutes. Third, the Board's administration of this provision occurs under a delegation from the Director and remains subject to the Director's ultimate supervision. Indeed, § 41.6(a)(2) expressly reserves to the Director the determination of whether special circumstances justify releasing information about an application otherwise entitled to confidentiality under 35 U.S.C. 122(a). With the advent of pre-grant publication under 35 U.S.C. 122(b), the vast majority of final Board decisions are soon expected to be routinely available at the time they are issued or shortly afterward. It is impracticable for the Director to administer disclosure of all of these decisions personally. The Board is the logical delegate to administer disclosure of Board actions.

Section 1.11(e) has been amended to simplify the language of the rule and to provide a cross reference to § 41.6.

Comment 5: One comment opposes the additional discretion in § 1.14(e)(2) to publish petition decisions.

Answer: The only changes to § 1.14 intended in this rule making were ministerial deletions of references to decisions of the Board. Another rule making, 68 FR 38624, has changed § 1.14 in a way that appears to address the concerns of the comment.

Comment 6: One comment suggests that extension of time practice in the proposed rules is confusing because it is not always clear whether § 1.136 or § 41.4 would apply.

Answer: As proposed, § 41.4(c) explained that § 41.4 applied to Board proceedings, but not during prosecution or during the time for judicial review. The rule has been amended to clarify that § 41.4 applies when a matter is actually pending before the Board. For instance, an extension of time to file an appeal brief, which is due before jurisdiction transfers to the Board, would be subject to § 1.136, while a request for additional time to file a request for reconsideration of a Board decision would be subject to § 41.4.

Comment 7: Two comments suggest that § 1.292(a) be modified to permit delegation of the conduct of public use proceedings to the Board of Patent Appeals and Interferences.

Answer: This suggestion falls outside the scope of the present rule making, in which § 1.292(a) was included simply to change a cross reference. The comments have been forwarded to the Deputy Commissioner for Patent Examination Policy for further consideration. Note, however, that § 1.292(a) would permit such a delegation without amendment.

Comment 8: One comment suggests additional modifications to § 1.292(a) as well as to subpart D of part 41 to authorize action by a single Board member and to provide relief in proceedings under 42 U.S.C. 2182(4) and 2457(d).

Answer: Subpart D provides sufficient flexibility to permit such actions without amendment.

Comment 9: Three comments suggest that the cross-reference to § 41.121(a)(2) in §§ 1.322–1.324 is too narrow because it would only permit corrections in a responsive motion. The suggested cure is to generalize the reference to § 41.121(a) because the need to correct can arise at various times and may not be in response to anything filed in a contested case.

Answer: The comments' reasoning is consistent with the filing of a miscellaneous motion (§ 41.121(a)(3)), but not with the filing of a substantive motion (§ 41.121(a)(1)). Consequently, Rules 322 to 324 have been revised to refer to § 41.121(a)(2) and (3).

Comment 10: One comment suggests that § 1.565(e) be amended to reflect the balance between the need for special dispatch in reexaminations and the need for the Office to ensure orderly proceedings, citing *Ethicon* v. *Quigg*, 849 F.2d 1422, 7 USPQ2d 1152 (Fed. Cir. 1988).

Answer: The proposed revision of § 1.565(e) only changed the cross-reference. The comment suggests a change that is outside the scope of this rule making. Nevertheless, the Office is keenly aware of the need for balance on this point.

Part 41, Subpart A—General Provisions

Comment 11: One comment suggests that the lack of paragraph designations in § 41.2 for each definition is confusing, particularly since subparagraphs are numbered.

Answer: The rule conforms to the guidance the Office of the Federal Register provides for drafting definitions. **Federal Register** Document Drafting Handbook section 8.15. Given that the defined terms are listed alphabetically and italicized, in practice the format should not be confusing.

Comment 12: One comment suggests that the definition of "Board of Patent Appeals and Interferences" in § 41.2, which includes both Board members and Board employees for non-final actions, is inconsistent with an Office rule making published 4 December 2003 at 68 FR 67818. The comment prefers the approach taken in this final rule. The comment is more relevant to the other rule making and has been forwarded to the Deputy Commissioner for Patent Examination Policy. Note that Board employees other than Board members are only defined as the Board for the purposes of non-final actions.

Comment 13: Two comments urge that § 41.3 creates confusion for petitions relating to rules in part 41 but arising while the Board does not have jurisdiction, for example, supervisory review of an examiner's answer for failure to comply with a rule.

Answer: Section 41.3 is amended to include a scope provision that limits its scope to actions by the Board or to proceedings pending before the Board.

Comment 14: One comment suggests that § 41.3(a) be amended to bar the Chief Administrative Patent Judge from delegating authority to enter a decision on a petition to a person who

participated in the matter being petitioned.

Answer: The suggestion involves matters of Board management, which are better treated in management documents like standard operating procedures.

Comment 15: One comment notes that proposed § 41.4(a) sets a "good cause" standard for obtaining an extension of time, whereas § 1.136(b), relating to non-fee extensions of time, sets a "sufficient cause" standard. The comment suggests either the commentary describe the differences, if any, between these two standards or adopt the "sufficient cause" standard in proposed § 41.4(a).

Answer: The "good cause" standard for obtaining an extension of time under § 41.4(a) will be maintained to distinguish it from the "sufficient cause" standard of § 1.136(b). An extension of time under § 41.4(a) for "good cause" is decided by the Board while an extension of time under § 1.136(b) for "sufficient cause" is decided outside of the Board. The "good cause" standard for obtaining an extension of time has previously been used by the Board in former § 1.645 (2003) and will be maintained even though there is little, if any, difference between the standards.

To establish good cause for a filing delay, a party must show that the delay was excusable under the circumstances and that the appellant exercised due diligence in attempting to meet the filing deadline. The factors bearing on whether there is good cause for an untimely filing include the length of the delay, knowledge of the time limit, circumstances beyond the party's control that affected its ability to comply with the deadline, the party's negligence, if any, and any unavoidable harm that might have prevented timely filing. Zamot v. MSPB, 332 F.3d 1374, 1377 (Fed. Cir. 2003).

Comment 16: One comment notes that extensions of time for certain deadlines in interferences can generally be obtained by stipulation according to the current Standing Order. The comment suggests changing proposed § 41.4(a) by adding at the end "or Order of the Board".

Answer: The practice of permitting stipulated changes is unaffected by this provision (which existed under § 1.645(a) (2003)). An authorized, stipulated change in a deadline is not an extension of the deadline. The suggested addition could create the misapprehension that the standard itself can be changed by order. The suggestion will not be adopted.

Comment 17: One comment states that proposed § 41.4(b) is particularly confusing in that it indicates that late filings "will not be considered absent a showing of excusable neglect or a Board determination that consideration on the merits would be in the interest of justice." Under current practice, when a notice of appeal or appeal brief is filed late, an applicant has the option of petitioning to revive that application under § 1.137 by showing that the delay in filing an appropriate paper or fee was unavoidable or unintentional. The comment states that it is not clear from the proposed § 41.4(b) whether the provisions of § 1.137 will be available for late filings of papers and fees after a notice of appeal is filed, or in what circumstances they will be available.

Answer: Section 41.4(b) has been revised to reflect that a late filing that results in either an application becoming abandoned or a reexamination proceeding becoming terminated under §§ 1.550(d) or 1.957(b) or (c) will be excused if the application or reexamination proceeding is revived as set forth in § 1.137. A late filing that does not result in either an application becoming abandoned or a reexamination proceeding becoming terminated under §§ 1.550(d) or 1.957(b) or (c) will be excused upon a showing of excusable neglect or a Board determination that consideration on the merits would be in the interest of justice.

Comment 18: One comment objects to the provision in § 41.5(b) of a disqualification proceeding before the Board as ill-defined and beyond the Board's competence.

Answer: The disqualification proceeding already exists in contested cases (see now-removed § 1.613 (2003)) where it appears to have worked well. The objection may be based on a misapprehension that this provision governs suspension or exclusion from practice before the Office generally rather than the special case of a suspension or exclusion from a specific case before the Board. Disqualifications at the Board typically arise out of conflicts of interest and, consequently, are more of a feature of contested cases.

The advent of appeals in inter partes reexaminations makes this provision relevant to appeals, too. Moreover, a disqualification might be appropriate in an ex parte appeal, for instance, when a former Office employee appears as counsel in a case in which he or she acted while at the Office. Note that disqualification could be in addition to other appropriate sanctions under 37 CFR part 10.

Although the comment suggests unease with the level of due process the disqualification proceeding would provide, at least two checks exist. A disqualification would not become final until the Chief Administrative Patent Judge certified the result. Counsel could seek to moot any disqualification by requesting to withdraw before the result is certified. If the Chief Administrative Patent Judge certifies the disqualification, the case becomes ripe for judicial review under 35 U.S.C. 32.

Comment 19: One comment opposes the requirement in § 41.5(c) that requires Board approval to withdraw as counsel in a Board proceeding.

Answer: The rule should not create any practical difference for counsel since approval is required for any withdrawal. The approval should come from the part of the agency with jurisdiction over the application or patent at the time of the withdrawal.

Comment 20: Two comments oppose § 41.7(a), which permits the Board to expunge unauthorized papers, because of the scope of the rule.

Answer: The rule has been clarified to state that it only applies to papers filed as part of a proceeding before the Board (§ 41.1(a)) or while the Board has jurisdiction over the file and will not be used to prune applications arbitrarily.

Comment 21: One comment suggests that expungement of papers under § 41.7(a) be limited to exceptional circumstances.

Answer: Violation of a rule or Board order, the triggers for expungement, should be an exceptional circumstance in patent practice.

Comment 22: One comment expresses concern that § 41.7(a) would prevent the entry of evidence and would result in an incomplete record. This, the comment suggests, would result in more judicial review being sought in district court rather than through direct appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit). The comment suggests that such filings are useful as a way to place papers in the record, knowing that they will not be considered by the Office, simply to get them in front of a court.

Answer: Such filings are not proper. Two remedies exist for expungement of a paper. In some cases, it may be appropriate to seek entry of new evidence in a district court under 35 U.S.C. 145 or 146. In most cases, however, the remedy would be to challenge the expungement directly by petition showing either that the paper was properly filed or that it should be retained in the interest of justice.

Comment 23: One comment recommends that a definition of "Board proceeding" be included in proposed § 41.2, to avoid possible inconsistencies

between the requirements of proposed § 41.7(b) and those of proposed § 41.37(c)(1)(ix).

Answer: Section 41.7(b) has been changed to read "A party may not file a paper previously filed in the same Board proceeding, not even as an exhibit or appendix, without Board authorization or as provided by rule" so as to avoid an inconsistency with the requirement of § 41.37(c)(1)(ix) to provide an appendix containing copies of evidence previously submitted and entered by the examiner.

Comment 24: One comment suggests that § 41.7(b) creates a burden by requiring a party to request entry of a duplicate paper that the Board may wish to have.

Answer: Parties should assume that the Board does not want the duplicate paper in the absence of a specific request or as provided by rule as discussed above.

Comment 25: Two comments suggest that § 41.8, which requires prompt reporting of changes in real party-in-interest or in related cases, is onerous as applied to appellants. In particular, they oppose the requirement to advise the Board of any change in the real party-in-interest or in related cases within 20 days of the change.

Answer: Section 41.8 has been reformatted so that the last clause referring to judicial review is now its own subsection. Proposed §§ 41.8(a) and (b) are now §§ 41.8(a)(1) and (a)(2), respectively.

The Federal Circuit requires any change in the real party-in-interest to be reported within seven days. Federal Circuit Rule (Fed. Cir. R.) 47.4(c). Section 41.8(a)(1) provides nearly triple the time the court provides in recognition of the greater number of appeals to the Board than to the court, but the Board needs to know such information just as much as the court does.

The burden to report changes in related cases is not onerous since most such changes are entirely under the control of the affected party. Such changes would include the filing of a continuation application claiming benefit of an application on appeal or the filing of a reissue application for a patent that is before the Board in a reexamination appeal. The amount of due diligence involved should be small for any party with an effective docketing system.

The last clause of § 41.8(a)(2) is now § 41.8(b) to raise its profile, but has been limited to contested cases because it is in that context, particularly in the case of judicial review under 35 U.S.C. 146, where the problems arise. Lack of adequate notice of judicial review in contested cases can result in applications that should be suspended pending the outcome of the judicial review being held abandoned or being allowed and other administrative complications.

Comment 26: One comment requests clarification of what constitutes a related case under § 41.8.

Answer: The requirement is substantially the same in scope as the requirement in Fed. Cir. R. 47.5. Now-removed § 1.656(b)(2) (2003) also imposed a similar requirement. The Board needs to know of related cases for several reasons. First, awareness of related cases facilitates scheduling and panel assignment, which can increase efficiencies for both the Board and the party. Second, a decision in a related judicial or administrative case may affect the outcome in the case before the Board.

For instance, a definition of a claim term in a related case may limit or expand the scope for the same term in a case before the Board. See *Ballard Med. Prods.* v. *Allegiance Healthcare Corp.*, 268 F.3d 1352, 1362, 60 USPQ2d 1482, 1501 (Fed. Cir. 2001) (claim limitations need not be the same); *Augustine Med., Inc.* v. *Gaymar Indus., Inc.*, 181 F.3d 1291, 1300, 50 USPQ2d 1900, 1907 (Fed. Cir. 2000) (holding that the prosecution history of a parent application may limit the scope of a later application using the same term); *Elkay Mfg. Co.* v. *Ebco Mfg. Co.*, 192 F.3d 973, 980, 52 USPQ2d 1007, 1107, 1114 (Fed. Cir. 1999) (prosecution history can apply to claim in different subsequent patent). Claims in the related case might be estopped by an adverse judgment in the interference (§ 41.127(a)(1)). A party that is aware of a related case, but nevertheless fails to disclose the case may fall short of its duty of candor to the Office. If the facts of the other case are materially different, then the related case might have no material effect on the case before the Board. *Georgia-Pacific Corp.* v. *United States Gypsum Co.*, 195 F.3d 1322, 1333, 52 USPQ2d 1590, 1599 (Fed. Cir. 1999) (inconsistent positions did not affect outcome).

Comment 27: Five comments oppose § 41.11 (which was proposed as § 41.105), the bar on ex parte communications, as too restrictive.

Answer: Proposed § 41.105 has been moved to § 41.11 in subpart A and has been revised to refer to inter partes reexaminations under subpart C and contested cases under subpart D because the concern about ex parte communications in adversarial cases is common to both types of proceedings.

The bar on ex parte communications in § 41.11 is stricter than the bar on ex parte interviews in § 1.955. Section 1.955 allows ex parte communications with an official acting on the merits as long as the merits are not discussed during the ex parte communication. Section 41.11 bars all ex parte communications with all administrative patent judges and with any Board employee acting on the merits. Non-merits ex parte communications may take place with other Board employees who are not acting on the merits of the case.

Section 41.11 is intended to be restrictive because experience has shown that ex parte communications are easily abused and easily shift from permissible topics to impermissible topics. The rule prohibits any ex parte contact about a pending case with an administrative patent judge because the administrative patent judge might be assigned to a panel in the proceeding.

Comment 28: Three comments urge that ex parte communications with Board staff can be helpful to practitioners without being injurious to the integrity of the proceeding. One comment recommends the establishment of a help desk. One of the comments suggested that the phrase "Board employee conducting the proceeding" be clarified.

Answer: The prohibition regarding other Board employees in § 41.11 has been clarified to say "assigned to the proceeding" to give parties a measure of confidence in contacting Board officials, other than administrative patent judges, that have not been expressly assigned to the case. As a general rule, support staff are not assigned to a proceeding. Other Board employees, like administrators, might be assigned an interlocutory role in a proceeding, but the party would have notice of the assignment. The Office agrees that informal contacts with support staff can be of great benefit to the parties. The rule is not intended to prohibit, and does not prohibit, such contacts.

Comment 29: Three comments note that the supplementary information in the notice of proposed rule making provides examples that appear to be more liberal than the rule. One of the comments recommended moving the examples from the supplementary information into the rule.

Answer: The examples are not exceptions to the rule. For example, when a party declines to participate in a hearing or conference, there is not an exception to the rule. Instead, it is a waiver by the non-participating party of the protections of the rule. A party cannot be permitted a heckler's veto on

the opposing party's ability to communicate with the Board. Even so, the Board will treat such one-sided communications with caution. For instance, a transcript of the communication may be required.

In another example, informing the Board in one proceeding of a related proceeding is not an ex parte communication about the contested case as long as the information does not extend beyond identifying information about the other proceeding. Such information is required under § 41.8.

Finally, citing a pending case in support of a more general proposition, again is not an ex parte communication about the contested case as long as the focus is on the general proposition and not on the merits of the cited case. For instance, citing a published opinion from a pending case has never been considered an ex parte communication. Similarly, a complaint to the Chief Administrative Patent Judge about delays in interferences generally, with a list of examples, is appropriate provided the complaint stays focused on the general problem of delays rather than issues in a particular cited proceeding. Any discussion of a particular aspect of a particular pending case must be treated formally in accordance with § 41.11.

Comment 30: One comment suggests that the rules were inconsistent in requiring parallel citation to the West Reporter System (West) and to the United States Patents Quarterly (USPQ) in contested cases, § 41.106(b)(4)(ii)(B), but not in appeals.

Answer: Proposed § 41.106(b)(4) has been relocated to new § 41.12 in subpart A to eliminate the inconsistency.

Comment 31: Three comments note that the Federal Circuit has changed its rules to eliminate the requirement for parallel citations to a West reporter and the USPQ. Two of the comments object that parallel citation imposes additional costs on parties. Two of the comments express a preference for not using the USPQ. One of the comments notes that Westlaw, the on-line West service provides much more complete coverage of current Board decisions than does the USPQ. The comments do not address the use of any other reporter or database service.

Answer: None of the comments explain why the court made this change or explain how it is applicable to Board practice. Of the printed reporters, USPQ provides much better coverage of patent decisions relevant to Board practice than West does. The Board cites to the West system as a courtesy to its reviewing courts, but principally uses the USPQ because of its greater relevance to Board practice.

If the Board were to eliminate the requirement for parallel citation, it would make more sense to eliminate the requirement to cite to the West system reporters. If citation to the USPQ were eliminated, the alternative would not be citation to West's printed reporters but to one of the on-line services, which would also raise issues of access and expense.

No reporter system is authoritative. *Hallco Mfg. Co.* v. *Foster*, 256 F.3d 1290, 1297 n.4, 59 USPQ2d 1346, 1350 n.4 (Fed. Cir. 2001) (relating an instance where the West reporter misprinted a paragraph, while the USPQ printed the decision correctly, and noting that only the court's print of the opinion is authoritative). Parallel citation thus also serves as a useful check on privately compiled reporters.

Comment 32: One comment notes that USPQ no longer provides very good coverage of Office decisions while many Board decisions are available through on-line services.

Answer: Most of the large volume of Board decisions that are available on-line are not properly citable as precedent. Consequently, the practical differences in coverage between Westlaw and the USPQ are less than the comment purports.

There is no ideal solution for which reporter system or systems should be required. This is a problem that confronts many adjudicative bodies. The Board has imposed a requirement on itself to cite both West reporters and the USPQ: the former to be responsive to the courts, the latter to address its own needs. The citation format used by parties before the Board must be consistent with Board practice.

Comment 33: One comment interprets proposed § 41.106(b)(4)(ii), now § 41.12(b), to bar citation to the Manual of Patent Examining Procedure (MPEP). The comment suggests that instead great weight should be given to the MPEP.

Answer: The rule does not bar citation to the MPEP. Rather the rule discourages the citation of authority that is not binding. Primary authority should be cited for legal issues in papers directed to the Board. Unless primary authority is unavailable, primary authority is always preferable to, and more persuasive than, any secondary authority.

Comment 34: One comment requested that the fee information in § 41.20 be restored to § 1.17, particularly since some of the § 41.20 fees must be paid before jurisdiction passes to the Board.

Answer: The fees were moved to part 41 to locate them with the rules that require the fees. Note that trademark-specific fees are located with the trademark rules in part 2. Cross-references to § 41.20 in the Board rules that require the fees should prevent confusion about where the fees are located. A cross-reference has been added at § 1.17(b) to offer further guidance.

Part 41, Subpart B—Ex Parte Appeals

Comment 35: One comment suggests that since appeals are a fairly common procedure, a notice of the changes to the appeal procedures should be mailed to each practitioner warning him or her of these changes.

Answer: The comment will not be adopted. A mailing of a notice of the changes to the appeal procedures to each practitioner is not required since it is each practitioner's responsibility under 37 CFR Part 10 to stay up-to-date on patent procedures. Nevertheless, the Board will attempt to mail a notice of the final rule making to every appellant with the docketing notice (see the Notice of revised appeal docketing procedures published in the July 2, 2002 OG) for several months.

Comment 36: One comment suggests that §§ 41.31(a)(1), (a)(2) and (a)(3) be amended to provide for appeal at any time after being twice or finally rejected, as appropriate, during pendency of the proceeding where no time period under § 1.134 is running. The comment states that the suggested change would ensure that § 41.31 would not be interpreted more restrictively than 35 U.S.C. 134, which sets forth no condition regarding when an appeal can be filed, apart from the requirements for claims being twice rejected (as in 35 U.S.C. 134(a)) or finally rejected (as in 35 U.S.C.134(b) and (c)). The comment also states that this amendment would prevent any potential inconsistency of the rules with the Board's precedential opinion, *Ex parte Lemoine*, 46 USPQ2d 1420, 1423 (BPAI 1994).

Answer: The suggestion will not be adopted. Sections 41.31(a)(1), (a)(2) and (a)(3) were proposed to generally incorporate the requirements of former § 1.191(a) (2003) and to subdivide § 1.191(a) into three parts to improve readability. Both former § 1.191(a) (2003) and §§ 41.31(a)(1), (a)(2) and (a)(3) are more restrictive than 35 U.S.C. 134 in that an appeal must be filed within the time period provided under § 1.134 for response to either a final rejection or a non-final rejection which rejects the claims for a second time, as appropriate. For example, an applicant for a patent whose claims have been twice rejected but not finally rejected, may appeal from the decision of the

examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134. However, if such an applicant files an amendment within the time period provided under § 1.134, the applicant may not file an appeal outside the time period provided under § 1.134. In such a situation, the applicant must wait for a new rejection by the examiner before an appeal can be filed.

Comment 37: One comment suggests that paragraphs (a)(1) and (a)(2) of § 41.31 be amended to remove the alternative clause (*i.e.*, "or finally") since this would make it clear that once the examiner rejects a claim for the second time (in the same application or in a continuing application), the decision as to whether to appeal the rejection or continue proceedings before the examiner will rest with the applicant. The comment notes that since a final rejection will never be made in a first rejection of a claim, the alternative language is not necessary and that the change is being suggested to reduce the periodic disputes between examiners and applicants as to whether an application under a non-final rejection was ripe for appeal.

Answer: The suggestion has been adopted. The Board's precedential opinion in *Ex parte Lemoine*, 46 USPQ2d at 1423, interpreted the language of 35 U.S.C. 134 that gives applicants the statutory right to an administrative appeal to mean that "so long as the applicant has twice been denied a patent, an appeal may be filed." Thus, the alternative language of the proposed rule (*i.e.*, "or finally (§ 1.113 of this title)" is not necessary.

Comment 38: One comment suggests that § 41.31(a)(3) be deleted. The comment states that this would eliminate the requirement that the patent owner wait until an examiner makes a second or subsequent rejection final, before being permitted to file an appeal in a reexamination proceeding filed on or after November 29, 1999 and thus would restore to patentee the decision as to when to file an appeal in a reexamination proceeding that is subject to repeated rejections. The comment also notes that the deletion of § 41.31(a)(3) would simplify the regulations as there would no longer be a need to determine filing dates of reexamination proceedings under this section.

Answer: The suggestion will not be adopted. 35 U.S.C. 134(b) provides that "[a] patent owner in any reexamination proceeding may appeal from the final rejection of any claim by the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal." According to the effective date provisions of Public Law 106–113, the provisions of 35 U.S.C. 134(b) apply to any reexamination proceeding filed on or after November 29, 1999. Accordingly, by law, the patent owner must wait until an examiner makes a second or subsequent rejection final, before being permitted to file an appeal in a reexamination proceeding and therefore both §§ 41.31(a)(2) and (a)(3) are necessary to inform a patent owner when an appeal in a reexamination proceeding may be taken.

Comment 39: One comment suggests that proposed § 41.33 be amended to refer to the "date of filing an Appeal" as opposed to referring to "after the date the proceeding has been appealed." This change would ensure consistency with Office language used in other regulations relative to "filing dates." The original language is confusing as it is not clear whether the date the "proceeding has been appealed" is the date typed by the Applicant on the Notice of Appeal, the date of the Certificate of Mailing affixed on a Notice of Appeal, or the date of filing accorded by the Office to the Notice of Appeal. Similarly, it is not clear what the date is that an amendment was "submitted." Do certificates of mailing or certificates of facsimile transmission, impact on the date of "submission" or the date that "the proceeding has been appealed"? A well accepted term like "date of filing" used consistently throughout the paragraph would avoid any possible confusion.

Answer: The suggestions have been adopted in § 41.33 and § 41.63.

Comment 40: One comment suggests that the word "may" be replaced with the word "will" in § 41.33. The comment states that this suggestion is made to avoid any possible confusion or abuse of the regulations by examiners and that there should be no flexibility given to examiners in entering minor cosmetic amendments as envisioned in this portion of the paragraph.

Answer: The suggestion will not be adopted. The use of the word "may" in § 41.33 rather then the word "will" is appropriate since it (1) is consistent with the current use of the word "may" in § 1.116; and (2) connotes that entry of amendments and evidence filed after appeal is not a matter of right but that such amendments and evidence filed after appeal may be admitted under certain circumstances set forth in the rule.

Comment 41: One comment notes that § 41.33(b) should also include a reference to § 41.50(c) as to permitted amendments.

Answer: The suggestion has been adopted.

Comment 42: One comment suggests incorporating § 41.33(c) into § 41.33(b), and having § 41.33(b) refer both to "amendments" and "affidavits or other evidence" submitted after filing an appeal. The comment states that this change would avoid separate discussion of amendments, affidavits and other evidence.

Answer: The suggestion will not be adopted since the prohibition against these filings is no longer the same. See Comment 41.

Comment 43: Five comments assert that proposed § 41.33 would unduly restrict the types of amendments and evidence that can be made after a Notice of Appeal is filed. One suggested solution was to remove paragraphs (b) and (c) of § 41.33 and instead rely upon (or substitute) the provisions of § 1.116. A second suggested solution was to amend paragraphs (b) and (c) of § 41.33 to take effect once the appeal brief is filed. A third suggested solution was that amendments making claim(s) allowable be permitted thus resolving issues that would otherwise be appealed.

Answer: The comments have been adopted to the following extent. Amendments submitted on or after the date the proceeding has been appealed may be admitted as provided in § 1.116. Thus, amendments after final but prior to appeal and amendments filed after appeal but prior to the date the brief is filed will be treated under the same standard (i.e, § 1.116). Amendments filed on or after the date of filing a brief may be admitted only to cancel claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, or to rewrite dependent claims into independent form. All other amendments submitted after the date the proceeding has been appealed will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i), 41.50(b)(1) and 41.50(c). Affidavits or other evidence submitted after the date the proceeding has been appealed and prior to the date a brief is filed overcoming all rejections under appeal may be admitted if the examiner determines that the affidavits or other evidence overcomes all rejections under appeal and a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. All other affidavits or other evidence submitted on or after the date the proceeding has been appealed will not be admitted except as permitted

by §§ 41.39(b)(1), 41.50(a)(2)(i) and 41.50(b)(1).

Comment 44: Two comments state that the proposed rules are unclear as to subsequent appeal procedures after prosecution is reopened subsequent to the filing of a first Notice of Appeal and Appeal Brief. Specifically, the comments question if prosecution is reopened under either § 41.39(b)(1), § 41.50(a)(2)(i) or § 41.50(b)(1), and a subsequent appeal is taken, would applicant be required to again pay the Notice of Appeal and Appeal Brief fees. The comments believe that this extra cost is unfair and burdensome to applicants because the reopening of prosecution would be the result of action by the examiner or the Board, not action by applicants. Accordingly, the comments suggest that provision should be made in the proposed rules that applicants need not twice pay the Notice of Appeal and Appeal Brief Fees in an application where those fees have already been paid but prosecution was then reopened.

Answer: The comment will not be adopted. The rule making did not propose to change the current procedures in this area. Currently, once a Notice of Appeal and Appeal Brief fee has been paid in a proceeding, a second Notice of Appeal and Appeal Brief fee will not be required except if a final Board decision has been made on the first appeal. For example, in an application for patent, a Notice of Appeal and Appeal Brief fees have been paid and the examiner reopens prosecution in a new Office action, new fees are not required for an applicant to appeal from that new Office action. Another example is in an application for patent, a Notice of Appeal and Appeal Brief fees have been paid and the Board in its decision makes a new ground of rejection and the applicant elects to reopen prosecution before the examiner, then new fees are required for an applicant to appeal from any new Office action by the examiner. The same procedures apply under the rules as implemented in this rule making.

Comment 45: One comment suggests that it ought to be made clear that the words of § 41.33, "rewrite dependent claims into independent form," includes both of the following two situations: (1) In conjunction with the rewriting of a dependent claim in independent form, amendment(s) would be allowed changing the dependency of claims which had depended from the independent claim being canceled, and (2) rather than rewriting a dependent claim in independent form, an independent claim can be amended to incorporate therein the subject matter of a dependent claim that has been identified by the examiner as being allowable.

Answer: The suggestion is adopted to the extent that the Manual of Patent Examining Procedure will provide that rewriting dependent claims into independent form as permitted under § 41.33 includes the following situations: (1) Rewriting a dependent claim in independent form by adding thereto the limitations of the parent claim(s); and (2) rewriting an independent claim to incorporate therein all the subject matter of a dependent claim, canceling the dependent claim and in conjunction therewith changing the dependency of claims which had depended from the dependent claim being canceled to the amended independent claim that incorporate therein all the subject matter of the now canceled dependent claim.

Comment 46: One comment suggests that § 41.37(a)(1) be amended, as suggested for § 41.33, to reference the "date of filing the notice of appeal," rather than the uncertainty that might be introduced by the phrase "the date of the notice of appeal."

Answer: The suggestion has been adopted.

Comment 47: One comment inquires if the "date of the notice of appeal" referred to in § 41.37(a) is the date the notice of appeal is signed, is filed, or is received by the Office.

Answer: As under current practice, the date of filing the notice of appeal is either (1) the date of deposit with the United States Postal Service if the provisions of 37 CFR § 1.10 are followed; or (2) the date of receipt by the Office.

Comment 48: One comment suggests that the clause "or within the time allowed for reply to the action from which the appeal was taken, if such time is later" be added at the end of paragraph 41.37(a)(1). The comment notes that this language currently appears in former § 1.192(a) (2003), and this additional time is a valuable option to applicants who file a notice of appeal with no intention of filing an appeal brief, but are filing the appeal simply to buy some additional time to permit the examiner to rule on an amendment filed under § 1.116. The comment states that any docketing benefits gained by the proposed change in this paragraph, as discussed by the proposed rule drafters, is far outweighed by the disadvantage to both applicants and the Office in having applicants file a brief simply as a strategy to maintain pendency, while the examiner renders a decision on an amendment filed under § 1.116.

Answer: The suggestion will not be adopted. The suggestion is based on the belief that the two-month period for filing an appeal brief that runs from the date of filing of the notice of appeal would expire before applicants have received a decision from the examiner on an amendment filed under § 1.116 (*i.e.*, an amendment filed after a final rejection but before or with the filing of a notice of appeal). It is expected that such a situation would be rare. In that rare situation, applicants can obtain an extension of time as provided in § 41.37(e). In addition, applicants can delay filing the notice of appeal until they have received a decision from the examiner on the amendment filed under § 1.116 especially if the amendment filed under § 1.116 is filed within two months from the date of mailing of any final rejection setting a three-month shortened statutory period for reply since it is Office policy (see MPEP 714.13) that if the advisory action is not mailed until after the end of the three-month shortened statutory period, the period for reply to the final rejection for purposes of determining the amount of any extension fee will be the date on which the Office mails the advisory action advising applicant of the status of the application, but in no event can the period for reply to the final rejection extend beyond six months from the date of the final rejection.

Comment 49: One comment inquires how the real party in interest should be identified in the appeal brief when the application involved in the appeal is assigned to a subsidiary corporation which corporation is owned by either a parent corporation or a joint venture between corporations.

Answer: When an application is assigned to a subsidiary corporation, the real party in interest is both the assignee and either the parent corporation or corporations, in the case of joint ventures. One example of a statement identifying the real party in interest is: The real party in interest is XXXX corporation, the assignee of record, which is a subsidiary of a joint venture between YYYY corporation and ZZZZ corporation.

Comment 50: One comment suggests that a requirement to identify the real party in interest should be made in contested cases, perhaps as part of a renamed § 41.108.

Answer: Section 41.8 entitled "Mandatory notices" already requires that at the initiation of a contested case (§ 41.101), and within 20 days of any change during the proceeding, a party must identify its real party-in-interest.

Comment 51: One comment suggests that the requirement in § 41.37(c)(1)(ii)

to identify related proceedings is ambiguous with respect to its scope. The comment believes that read broadly, it would require an appellant to identify every precedential decision that might bear on the issues on appeal and could expose an appellant to unreasonable allegations of inequitable conduct.

Answer: The requirement in § 41.37(c)(1)(ii) to identify related proceedings does not require an appellant to identify prior proceedings involving unrelated parties including precedential decisions that might bear on the issues on appeal. The requirement in § 41.37(c)(1)(ii) to identify related proceedings does require an appellant to identify every related proceeding (*e.g.*, commonly owned applications having common subject matter, claim to a common priority application).

Comment 52: One comment suggests that § 41.37(c)(1)(iii) be deleted in its entirety, as it introduces an unnecessary additional burden on appellants with no discernible benefit to the Office. The comment states that since only rejected claims are subject to an appeal, there seems to be no benefit in identifying the status of claims that are not subject to appeal and that asking appellants to make this type of listing for claims that are not rejected and thus are not subject to appeal, would introduce a risk of inadvertent error by appellants and in any event, would likely be ignored by the examiner and the Board.

Answer: The suggestion will not be adopted. Section 41.37(c)(1)(iii) generally incorporates only the requirements of former § 1.192(c)(3) (2003) that a statement of the status of all the claims be presented and an identification of those claims that are being appealed. As such it does not introduce an unnecessary additional burden on appellants. Moreover, the benefit to the Office of this requirement is that the Board is directly informed as to the status of all the claims in the proceeding (*e.g.*, rejected, allowed or confirmed, withdrawn, objected to, canceled) and which of those claims that are being appealed. For example, should the Board have knowledge of any grounds not involved in the appeal for rejecting any pending claim, the Board under the authority of § 41.50(b) may make a new ground of rejection.

Comment 53: One comment expresses concern in regard to the requirement of proposed § 41.37(c)(1)(v) that a concise explanation of the subject matter defined in each of the independent claims involved in the appeal be provided. Specifically the comment asks what is a concise statement, what is required, does the explanation have to show how each claim is different, does the requirement apply to all drawings and embodiments, or only a representative drawing? The comment states that the Office deleted a similar requirement in 1992 relating to documents submitted in an IDS because "concise explanation" descriptions rarely communicated any useful information, improved the quality of patent examination but provided an opportunity to attack the patent on the grounds of inequitable conduct. The comment suggests that the requirement be clarified or dropped.

Answer: A patentability determination must be performed on a claim-by-claim basis. The first step in a patentability determination is to construe a given claim and determine its metes and bounds. "Analysis begins with a key legal question—what is the invention *claimed*?" since "[c]laim interpretation * * * will normally control the remainder of the decisional process." *Panduit Corp.* v. *Dennison Manufacturing Co.*, 810 F.2d 1561, 1567–68, 1 USPQ2d 1593, 1597 (Fed. Cir.), *cert. denied*, 481 U.S. 1052 (1987). The existing provisions of 37 CFR § 1.192(c)(5) (2003) are directed to providing a summary of the "invention," not the claims. *See In re Hiniker Co.*, 47 USPQ2d 1523 (Fed. Cir. 1998): "The invention disclosed in Hiniker's written description may be outstanding in its field, but the name of the game is the claim. *See* Giles Sutherland Rich, *Extent of Protection and Interpretation of Claims—American Perspectives*, 21 Int'l Rev. Indus. Prop." By statute, the Board reviews "adverse decisions of examiners upon applications for patents." 35 U.S.C. 6(b). For the Board to reach an informed decision on the merits of a rejection presented for review, the record should reflect the respective positions of the examiner and appellant as to the scope of the claims. It is the experience of the Board that the prosecution and examination in a significant number of appeals forwarded for decision on appeal has taken place in the context of "applicant's invention," not on a claim-by-claim basis. Thus, the Board is oftentimes confronted with a record in which no significant claim construction has occurred. Those records are not susceptible to meaningful review and result in an inordinate number of remands.

The determination of how "concise" the explanation must be will need to be determined on a case-by-case basis. If the prosecution and examination has been based upon a discussion of the patentability of individual claims instead of the "invention," it is expected the explanation will be more "concise" than if the prosecution and examination has been conducted on the basis of the "invention." As to what is required, the proposed rule states that reference to the specification by page and line number, and to the drawing, if any, by reference characters is required. Appellant may include any other information of record which will aid the Board in considering the subject matter of each independent claim. The explanation does not have to show how each claim is different. The purpose of the requirement is to aid the Board in considering the subject matter of the independent claims so that an informed review of the examiner's adverse determination of patentability can be made. Whether the explanation is limited to a single drawing or embodiment or is extended to all drawings and embodiments is a decision appellant will need to make.

The proposed concise explanation of the subject matter defined in each independent claim is different from a concise explanation of a reference. It is the applicant who is responsible for drafting claims and choosing the language and terms used to define the claimed invention. 35 U.S.C. 112(2) ("The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.") As the originator of the claim language, applicant should know what is intended by the various words and phrases used to define the claimed subject matter and thus, providing a concise explanation of the subject matter of each independent claim as proposed should not be an undue burden. This is in contrast to explaining the possible relevance of a document that may not have originated from applicant. Another difference is that the number of independent claims presented for review in an appeal is a matter directly within appellant's control, while appellant does not have control over the number of documents that should be cited to the Office.

The subject matter of each independent claim needs to be concisely explained for a number of reasons. For example, if the Board decides that a rejection is to be reversed for a given independent claim, the remaining independent claims must be reviewed to determine if the reasons for reversing the rejection of the first independent claim apply to the remaining independent claims. Furthermore, if appellant chooses to argue a group of claims which includes more than one independent claim, the

Board will need to review, at the least, each independent claim to determine which claim will be selected as representative of the group. Apart from reviewing the examiner's adverse decision on patentability, the Board may also make new grounds of rejection pursuant to former § 1.196(b) (2003) or make an explicit statement that a claim would be allowable if amended under former § 1.196(c) (2003). The concise explanation of the subject matter of each independent claim will aid the Board in making these determinations.

Comment 54: Several comments address the provision of proposed § 41.37(c)(1)(v) that every means plus function and step plus function as permitted by 35 U.S.C. 112(6) used in the claims be identified and the structure, material, or acts described in the specification as corresponding to each claimed function be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. A number of comments express concern that this requirement may result in a limiting claim construction or create prosecution history estoppel. The comments also take the position that the requirement would be unduly burdensome in that appellant would need to provide this analysis whether a claim limitation was in "issue" in the appeal. Another comment indicates that the proposed rule is not clear as to whether it applies to "all drawings and embodiments, or only a representative drawing." Another comment expresses concern that the proposed rule may be subject to abuse, as where an examiner takes the position that claims that are not couched in means-plus-function terminology of 35 U.S.C. 112(6) are nevertheless subject to the provisions of that section and this proposed rule. Suggested changes include using the rule as a procedural tool rather than a substantive requirement or to require only the identification of one or more examples of the support for each independent or separately argued claim, rather than all examples of support for every claim. Another suggested change is that any issues in regard to the Board's need for such an identification in order to reach a reasoned decision be addressed by way of an order under the existing provisions of § 1.196(d) (2003).

Answer: The suggestion is adopted to the extent that every means plus function and step plus function as permitted by 35 U.S.C. 112(6) must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters only for each independent claim involved in the appeal and for each dependent claim argued separately under the provisions of § 41.37(c)(1)(vii). Whether a statement made by an applicant during procurement of the patent from the Office results in an estoppel is a matter that is ultimately decided during proceedings outside the Office. The decision to grant the patent by the Office must be based upon a firm and clear understanding of the scope of the individual claims. If the prosecution and examination of claims involving issues under 35 U.S.C. 112(6) has been based upon individual claims and in accordance with the procedures set forth in MPEP 2181 for claim language involving issues under this section of the statute, it is anticipated that this aspect of the rule will be based upon the statements and determinations already of record and thus does not constitute a significant burden. See MPEP 2181 (explaining that the Office must apply 35 U.S.C. 112(6) in appropriate cases, and give claims their broadest reasonable interpretation, in light of and consistent with the written description of the invention in the application, citing *In re Donaldson*, 16 F.3d 1189, 1194, 29 USPQ2d 1845, 1850 (Fed. Cir.1994)). However, if the prosecution and examination has been based upon the "invention" and not individual claims, it may be that appellant will be making statements regarding claim scope for the first time during the appeal proceeding. To the extent this is seen as a burden or creating a possible estoppel, it may be that this is an indication that the case, while eligible for an appeal under the statute and the rules, may not be ready for an appeal.

The comments expressing concern that the proposed rule extends to 35 U.S.C. 112(6) limitations which are not in "issue" are presumably based upon the perspective that appellant and the examiner have agreed upon the correct construction of such characterized limitations during the prosecution and examination of the application up to the appeal stage, not that such characterized limitations have been ignored or not commented upon during the pre-appeal proceedings. If the former has occurred, it should not be an undue burden to provide the needed analysis. If the latter applies, appellant will need to directly address each limitation so that the record is clear as to where the underlying structure, steps or materials are described in the written description of the application so that the Board can understand the subject matter of the individual claims presented for review. The suggestion that this provision apply only to the independent claims or claims that are separately argued is adopted.

Issues regarding whether the language chosen by applicant to define a claim limitation falls within 35 U.S.C. 112(6) are discussed in MPEP 2181. Whether specific claim language invokes the provisions of 35 U.S.C. 112(6) is a merits issue to the extent it involves the determination of claim scope. If an applicant believes that an examiner has not followed proper procedure, relief may be had by way of a petition under § 1.181.

The proposal to make this requirement a procedural tool instead of a substantive requirement is not adopted. Claim construction during any stage of a patentability determination is a substantive matter, not a procedural tool, as it controls the substantive application of the law and facts to the claim language under review.

Comment 55: A comment was made in regard to proposed § 41.37(c)(1)(vii) that examiners will sometimes only reject the independent claims or make a "jumbled" rejection where it is not clear what arguments apply to which claims. Under these circumstances the comment believes that it is a burden to require appellant to provide separate argument for each and every dependent claim. The comment also states that "it [the rule or the rejection?] pushes Applicants into the position of having to make potentially prejudicial statements regarding claims, where the Examiner has not initially met the burden of providing a prima facie case of obviousness. Where the grounds of rejection are of the nature that the Examiner has failed to indicate what grounds of rejection apply to a group of claims, Applicants should simply be able to say this, without thereby risking that the group of claims stands or falls together." A second comment expresses concern that failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately may impact the ultimate presumption of each claim in an issued patent under 35 U.S.C. 282, noting that the current rule does not contain any waiver provision.

Answer: Patentability must be decided on a claim-by-claim basis. Merits decisions of the Board in ex parte appeals must determine the patentability of individual claims, not whether an "invention" is patentable or a group of claims is patentable. Thus, the arguments in the Appeal Brief are

preferably directed to individual claims. If appellant chooses to argue claims as a group as permitted, the Board will pick a single claim to decide the appeal to the group of claims as to that ground of rejection. If the prosecution and examination of a case has proceeded to the point of an appeal without applicant and the examiner discussing the merits of individual claims, that is an indication that the case is not ready for an appeal. If applicant believes that a rejection set forth in an Office action is "jumbled" or in any other manner does not clearly communicate the facts and reasons why the individual claims subject to the rejection are unpatentable, relief may be available by way of a petition under § 1.181.

The waiver provision of the proposed rule reflects the view expressed in In re McDaniel 63 USPQ2d 1462, 1468 (Fed. Cir. 2002) (Mayer, C.J. dissenting-in-part) that "in stating that claims 53–64 stand or fall together, [McDaniel] has waived any argument that claims 55–57 are patentable for reasons independent of claim 53."

Comment 56: One comment notes that each appeal is unique and that there "is no good reason for making detailed requirements as to the form of presentation of explanations and arguments in an appeal brief" as proposed in § 41.37(c)(1)(vii). The comment observes that the "Office properly assumes that an examiner is capable of responding to any appeal brief under either the existing rule or the proposed rule each of which simply requires a written statement in answer to appellant's brief including such explanation of the invention claimed and of the references and grounds of rejection as may be necessary. The comment asks the questions "Should not the same simple requirements be in effect as to the appeal brief? What's sauce for the goose should be sauce for the gander?"

Answer: The structure provided for by the requirements of § 41.37 ensures that Appeal Briefs will provide the information the Board needs to render an informed decision on the issues presented for review. While each appeal is unique in regard to the issues and arguments presented, there is certain information common to each appeal which is amenable to being provided by way of a prescribed format. The view expressed in the comment that examiners are under "simpler requirements in preparing an Examiner's Answer than appellant is in preparing the Appeal Brief" is misplaced. Detailed guidance to examiners as to procedural requirements in performing their duties and preparing Office actions is typically contained in the MPEP, not the rules. The procedural requirements examiners must follow in preparing an Examiner's Answer are found in MPEP 1208.

Comment 57: One comment suggests that § 41.37(c)(1)(vii) be amended to add the word "separate" prior to "patentability" in the last sentence. The comment states that this would clarify that pointing out what a claim recites will not be considered an argument for "separate" patentability of a claim, since such an argument could in fact establish patentability of that claim without establishing "separate" patentability of the claim.

Answer: The suggestion to add the word "separate" prior to "patentability" in the last sentence has been adopted in § 41.37(c)(1)(vii) and § 41.67(c)(1)(vii).

Comment 58: One comment inquires if the requirement in § 41.37(c)(1)(ix) for an evidence appendix containing copies of any evidence submitted to the examiner and relied upon by the appellant in the appeal was inconsistent with the provision in § 41.7(b) that precludes a party from filing a paper previously filed in the same Board proceeding without Board authorization.

Answer: Section 41.7(b) has been amended so that the requirement in § 41.37(c)(1)(ix) for an evidence appendix containing copies of any evidence submitted to the examiner and relied upon by the appellant in the appeal is consistent with the provisions of § 41.7(b).

Comment 59: One comment suggests that § 41.37(c)(1)(ix) be amended to require identification of "when the evidence was submitted into the record by Applicants or where in the record that evidence was entered in the record by the Examiner." The comment states that this suggestion was made since examiners will frequently not make a positive statement indicating approval of entry into the record of evidence presented by applicants. The comment states that absent specific indication by the examiner that any evidence submitted was refused entry, the evidence is presumed to have been entered as of the submission date. Thus, the suggested change would remove any ambiguity regarding how to comply with this requirement should the examiner not make an affirmative entry of the evidence.

Answer: The suggestion is not adopted. Evidence submitted after final rejection is not presumed to have been entered and must be specifically admitted by the examiner as set forth in § 1.116 as amended by this rule making. Evidence submitted either before the first Office action or after a non-final rejection may be presumed to have been entered only when treated by an examiner in an Office action. Accordingly, the requirement of § 41.37(c)(1)(ix) of a statement setting forth where in the record the evidence was entered in the record by the examiner is met by an explicit statement entering the evidence or implicitly by an Office action weighing the evidence. Prior to filing an appeal brief, if applicants have submitted evidence to the examiner and it is not clear if this evidence has been entered or not entered, appellants should contact the examiner to inquire as to the status of that evidence. For example, if a § 1.132 declaration is timely filed in response to non-final Office action and the next action by the examiner is a final rejection which does not mention the § 1.132 declaration, applicants should contact the examiner to inquire as to the status of the § 1.132 declaration before filing an appeal since a brief arguing that evidence is not permitted by § 41.37(c)(1)(ix). The likely result of such an inquiry would be a new Office action treating the § 1.132 declaration or being informed that the Office has no record of the § 1.132 declaration.

Comment 60: One comment requests clarification as to whether appendixes as required by §§ 41.37(c)(ix-x) are necessary at all when no evidence or related proceedings exist, or whether an appendix must be included with the indication "none."

Answer: Sections 41.37(c)(ix-x) require the appeal to contain an evidence appendix and a related proceedings appendix. If no evidence or related proceedings exist, an evidence appendix should be included with the indication "none" and a related proceedings appendix should be included with the indication "none." In addition, a brief containing a Table of Contents indicating that no evidence appendix is part of the brief or that no related proceedings appendix is part of the brief would be acceptable under the Rule since it would clearly indicate that no evidence is being relied upon by the appellant in the appeal or that no related proceedings having decisions rendered by a court or the Board exist.

Comment 61: One comment states that it would be useful to have an example of a format and content for an appeal brief that would comply with the new regulations published with the notice of final rule making and ultimately incorporated into the Manual of Patent Examining Procedure.

Answer: An example of a format and content for an appeal brief is a brief

containing the following items, with each item starting on a separate page:

(1) Identification page setting forth the applicant's name(s), the application number, the filing date of the application, the title of the invention, the name of the examiner, the art unit of the examiner and the title of the paper (*i.e.*, Appeal Brief)

(2) Table of Contents page(s)

(3) Real party in interest page(s)

(4) Related appeals and interferences page(s)

(5) Status of claims page(s)

(6) Status of amendments page(s)

(7) Summary of claimed subject matter page(s)

(8) Grounds of rejection to be reviewed on appeal page(s)

(9) Argument page(s)

(10) Claims appendix page(s)

(11) Evidence appendix page(s)

(12) Related proceedings appendix page(s).

Comment 62: One comment suggests that the reference to §§ 41.31–41.37 in § 41.39(a)(1) be changed to refer to § 41.31 or § 41.37.

Answer: The suggestion has been adopted. In addition, a similar change has been made to § 41.69(a)(1).

Comment 63: One comment recommends that § 41.39(a)(1) be amended to clarify the manner in which the Director will notify the public as to the time within which the primary examiner will be required to furnish a written answer to the appeal brief.

Answer: The comment will not be adopted. The Director currently notifies the public as to the time within which the primary examiner is expected to furnish a written answer to the appeal brief in the MPEP. Section 1208 of the MPEP provides that "[t]he examiner should furnish the appellant with a written statement in answer to the appellant's brief within 2 months after the receipt of the brief by the examiner."

Comment 64: Several comments suggest that any new ground of rejection be approved by the appeal conference in the Technology Center or by a Technology Center Director.

Answer: The suggestion is adopted to the extent that the MPEP will provide that each examiner's answer containing a new ground of rejection must be approved by a Technology Center Director or designee. An appeal conference is mandatory in all cases in which an acceptable appeal brief has been filed. The participants of the appeal conference should include (1) the examiner charged with the preparation of the examiner's answer, (2) a supervisory patent examiner (SPE), and (3) another examiner, known as conferee, having sufficient experience to be of assistance in the consideration of the merits of the issues on appeal. During the appeal conference, the participants of the appeal conference will decide whether a new ground of appeal is appropriate. On the examiner's answer, the word "conferees" should be included, followed by the typed or printed names of the other appeal conference participants. The appeal conference participants will place their initials next to their name to make clear that the appeal conference has been held. A Technology Center Director or designee must also initial/approve an examiner's answer containing a new ground of rejection.

Comment 65: One comment suggests that allowing the examiner to institute a new ground of rejection in the examiner's answer is unfair to the appellant and the examiner should be required to reopen prosecution.

Answer: If the examiner institutes a new ground of rejection in the examiner's answer, then the appellant has two months to either request that prosecution be reopened by filing a reply under § 1.111 or file a reply brief under § 41.41, which would act as a request that the appeal be maintained. Accordingly, although the examiner may in limited situations institute a new ground of rejection on appeal, the appellant has the right to request that prosecution be reopened. An appellant may not wish to have prosecution reopened if the new ground of rejection is similar to a prior rejection or if the evidence of record is sufficient to address the rejection. Moreover, reopening prosecution may prolong examination without any benefit to the appellant.

Comment 66: One comment suggests that the new arguments are necessary in the appeal brief because the conferees and supervisors are more experienced than the examiner and if the case proceeds to the Board, the audience is an APJ, who has quite different qualifications than either the conferee or the supervisor. Moreover, the comment suggests that the rule is unnecessary because nothing in the rule prevents the examiner from responding to new arguments raised in the appeal brief.

Answer: Former § 1.193(a)(2) (2003) prohibited an examiner's answer from including a new ground of rejection except under very limited circumstances. Accordingly, an examiner could not respond to a new argument raised in an appeal brief by adding a new ground of rejection in the examiner's answer. Because the former appeal rules only allowed the examiner to make a new ground of rejection by reopening prosecution, some examiners have allowed cases to go forward to the Board without addressing the new argument. Section 41.39(a)(2) will improve the quality of examination and possibly reduce pendency by providing for the inclusion of a new ground of rejection in an examiner's answer.

Comment 67: One comment suggests that the Office should require the examiner making a new ground of rejection to acknowledge any mistakes the examiner may have made, explain the time and circumstances in which the new ground of rejection became known to the examiner, and explicitly point out to which arguments in the brief the new ground of rejection is responsive.

Answer: The suggestion will not be adopted. The making of a new ground of rejection in an examiner's answer is in itself an acknowledgment of an error made in the rejection under appeal. Requiring the examiner to explain the time and circumstances in which the new ground of rejection became known to the examiner and to explicitly point out to which argument in the brief the new ground of rejection is responsive would delay prosecution and be of little or no value in determining the appropriateness of the new ground of rejection. As set forth above, a Technology Center Director or designee must initial/approve an examiner's answer containing a new ground of rejection. The Technology Center Director or designee will be aware that allowing a new ground of rejection in an examiner's answer is not open-ended but is envisioned to be rare rather than a routine occurrence. In addition, the Office plans to issue instructions that will be incorporated into the MPEP as to what circumstances would be appropriate for entry of a new ground of rejection in an examiner's answer rather than reopening of prosecution.

Comment 68: One comment suggests that any new grounds of rejection be limited to new rejections made in response to an argument presented for the first time in an appeal brief.

Answer: The comment is not adopted. As set forth above, the Office plans to issue instructions that will be incorporated into the MPEP as to what circumstances would be appropriate for entry of a new ground of rejection in an examiner's answer rather than reopening of prosecution. An examiner will be permitted to make a new ground of rejection in an examiner's answer in the situation where an examiner obviously failed to include a dependent claim in a rejection.

For example, in the final rejection, claims 1, 13, and 27 were rejected under 35 U.S.C. 102(b) as being anticipated by

U.S. Patent No. Y. Claim 27 depended upon claim 22 which depended upon claim 13 which depended upon claim 1. No rejection of claim 22 was set forth in the final rejection; however, the summary sheet of the final rejection indicated claims 1, 13, 22 and 27 as being rejected. In this situation, the examiner would be permitted to reject claim 22 under 35 U.S.C. 102(b) as being anticipated by U.S. Patent Y as a new ground of rejection in the examiner's answer. Accordingly, it would not be appropriate to limit new grounds of rejection to only a rejection made in response to an argument presented for the first time in an appeal brief.

Nevertheless, it will be the policy of the Office that, in general, if an appellant has previously submitted an argument during prosecution of the application and the examiner has ignored that argument, the examiner will not be permitted to add a new ground of rejection in the examiner's answer to respond to that argument but would be permitted to reopen prosecution, if appropriate.

Comment 69: Two comments suggests that if the Office introduces a new ground of rejection, then the appellant should have a full range of prosecution options available and not be limited to amendments and/or evidence responding to the new ground of rejection.

Answer: The options provided by § 41.39(b) to respond to a new ground of rejection in an examiner's answer give the appellant the choice of maintaining the appeal or reopening prosecution before the primary examiner. Moreover, if prosecution is reopened, it is reasonable to require that any amendment and/or evidence be responsive to the new ground of rejection. Any such responsive amendment and/or evidence may also be directed to claims not subject to the new ground of rejection. Furthermore, it is noted that the appellant can file a request for continued prosecution pursuant to § 1.114 and then the appellant would be able to submit an amendment and/or evidence directed only to claims unrelated to the new ground of rejection and have such considered by the examiner. Therefore, the appellant does have a full range of prosecution options.

Comment 70: Several comments suggest that although there may be circumstances where the introduction of a new ground of rejection is desirable, the situations where such new ground is introduced should be infrequent.

Answer: As noted in the proposed rule making, the change to permit new grounds of rejection in the examiner's answer is envisioned to be a rare, rather than routine, occurrence. The Office will provide guidance to the examiners in the MPEP as to what circumstances would be appropriate for entry of a new ground of rejection in an examiner's answer rather than reopening prosecution.

Comment 71: One comment suggests that § 41.39(c) be changed to state that extensions under § 1.136(a) are not applicable only to the time period for filing a reply brief under § 41.39(b)(2), thereby permitting an appellant to obtain an appropriate extension of time under § 1.136(a) for filing of a response when re-opening prosecution under § 41.39(b)(1).

Answer: The comment will not be adopted. It is believed to be beneficial to applicant to provide a single mechanism to extend the two-month time period to respond to an examiner's answer containing a new ground of rejection. Having one extension of time provision if the applicant elects to reopen prosecution before the primary examiner and another extension of time provision if the applicant elects to maintain the appeal by filing a reply brief can easily cause problems especially when the applicant has not yet decided which course of action to follow.

Comment 72: One comment asks whether a reply brief filed in response to a new ground of rejection in accordance with § 41.39(b)(2) has to address only the new ground of rejection or all remaining grounds of rejection including those covered in the original appeal brief. The comment also states that it is not clear what is intended by the requirement that the appeal brief should follow the other requirements of a brief as set forth in § 41.37(c).

Answer: A reply brief filed in response to a new ground of rejection in accordance with § 41.39(b)(2) only has to address the new ground of rejection. In such an instance, the reply brief should include the following items, with each item starting on a separate page, so as to follow the other requirements of a brief as set forth in § 41.37(c):

(1) Identification page setting forth the applicant's name(s), the application number, the filing date of the application, the title of the invention, the name of the examiner, the art unit of the examiner and the title of the paper (*i.e.*, Reply Brief)

(2) Status of claims page(s)

(3) Grounds of rejection to be reviewed on appeal page(s)

(4) Argument page(s)

However, a reply brief filed in response to a new ground of rejection in accordance with § 41.39(b)(2) can be a substitute brief replacing the original brief by responding to both the new ground of rejection and all remaining grounds of rejection covered in the original appeal brief. In such an instance, the reply brief must meet all the requirements of a brief as set forth in § 41.37(c).

Comment 73: One comment suggests that proposed § 41.41 be amended to allow a reply brief to include a new or non-admitted amendment, affidavit or other evidence upon a showing of good and sufficient reasons why they are necessary and were not earlier presented.

Answer: The suggestion is not adopted. An appeal should be decided upon a fixed record, not an ever-changing one. While it is proposed to allow examiners to make a new ground of rejection once again, the appellant may request prosecution be reopened under proposed § 41.39(b)(1) to supplement the record. Absent a new ground of rejection in the Examiner's Answer, the record before the Board should remain fixed as of the date the appeal brief is filed so that a reasoned review of the record may efficiently take place.

Comment 74: Two comments express concern that the option of permitting a supplemental examiner's answer to respond to a new issue raised in a reply brief could be construed as to permit a supplemental answer in almost any case and lead to a repeated exchange between the examiner and the appellant that would not promote a just, speedy, or inexpensive resolution of the proceeding. One comment notes that there may be rare circumstances when such a supplemental examiner's answer is appropriate. That comment suggests that the number of supplemental examiner's answers be limited to one unless personally approved by the Commissioner for Patents or one of his deputies.

Answer: The suggestion is adopted to the extent that the MPEP will provide that each supplemental examiner's answer must be approved by a Technology Center Director or designee.

Comment 75: One comment suggests that the comments made in the background discussion of proposed § 41.43(a)(1) be changed to remove any prohibition on the right by the appellant to file a reply brief. The comment states that appellants should have the right to file a reply brief in any situation. The comment notes that the Office had an earlier procedure that specified situations in which reply briefs could be

filed and that this resulted in disputes and petition filings, where the examiner and the appellant disagreed as to whether the filing of a reply brief was permissible. The comment observes that the now-superseded rules no longer prohibited the filing of a reply brief and suggests that this practice should continue and that appellants should always be permitted to have the last word.

Answer: Former § 1.193(b) (2003) provided that an appellant may file a reply brief to an examiner's answer or a supplemental examiner's answer within two months from the date of such examiner's answer or supplemental examiner's answer. Section 41.41(a)(1) provides that an appellant may file a reply brief to an examiner's answer within two months from the date of the examiner's answer and § 41.43(b) provides that if a supplemental examiner's answer is furnished by the examiner the appellant may file another reply brief under § 41.41 to any supplemental examiner's answer within two months from the date of the supplemental examiner's answer. Thus, the rules continue to permit the appellant to always have the last word. That is, the appellant may always file a reply brief to an examiner's answer or a supplemental examiner's answer within two months from the date of such examiner's answer or supplemental examiner's answer. The background discussion of proposed § 41.43(a)(1) noted that an indication of a change in status of claims (*e.g.*, that certain rejections have been withdrawn as a result of a reply brief) is not a supplemental examiner's answer and therefore would not give the appellant the right to file a reply brief. This is not a change from current practice where an examiner is permitted to respond to a reply brief by indicating a change in status of claims (*e.g.*, that certain rejections have been withdrawn as a result of a reply brief) on form PTOL–90. This indication of a change of status is not a supplemental examiner's answer and therefore the appellant has no right to file a further reply brief.

Comment 76: One comment suggests that the second sentence (An appeal decided on the briefs without an oral hearing will receive the same consideration by the Board as appeals decided after an oral hearing) of § 41.47(a) be deleted. The comment believes that the statement that an appeal without an oral hearing will be decided the same way as an appeal with an oral hearing denies the fact oral and written presentations differ in many respects and the fact that oral presentations are not cut and dried like many written briefs.

Answer: The comment will not be adopted. While oral and written presentations do differ in many respects, an appeal decided on the briefs without an oral hearing does receive the same consideration by the Board as appeals decided after an oral hearing.

Comment 77: Four comments state that the proposed requirement of § 41.47(e) that at the oral hearing, the appellant may only rely on evidence that has been previously entered and considered by the primary examiner and present argument that has been relied upon in the brief or reply brief was too rigid. Most of the comments believe that an appellant should be able to make an argument not present in the briefs if good cause is shown such as new law or facts. One comment submits that demonstrative exhibits should not be precluded by this requirement.

Answer: Section 41.47(e) has been amended to permit the appellant and/or the primary examiner, upon a showing of good cause, to rely on a new argument based upon a recent relevant decision of either the Board or a Federal Court. In addition, a demonstrative exhibit (*e.g.*, a sample of the invention as shown in the application's drawings) solely directed to information of record that is not being relied upon to establish patentability is not precluded by this rule.

Comment 78: One comment states that there does not appear to be any limitation on the authority to cancel requested Oral Hearings as set forth in proposed § 41.47(f). The comment notes that the commentary to the proposed rule indicates that the rule would be applied where a remand to the Examiner is necessary or where the Examiner's position could not be sustained. The comment suggests that the rule could be clarified by adding, for example, "in order to remand to the Examiner or to grant the requested relief" after "if the Board decides that a hearing is not necessary" but before the comma. Another comment suggests that § 41.47(f) be amended after "notify appellant" to state "and provide the appellant an opportunity to indicate whether or not to hold an oral hearing" to make it clear that a party is entitled to an oral hearing if the party notifies the Board timely and pays the fee for an oral hearing.

Answer: The suggestions will not be adopted. The substance of § 41.47(f) is found in former § 1.194 (2003) and therefore no substantive change was proposed. Moreover, in a situation where the Board has decided that no hearing is necessary because the Board has become convinced, prior to hearing, that the examiner's position will be reversed or the proceeding needs to be remanded, there is no reason to provide the appellant with an opportunity to nevertheless hold an oral hearing. The Manual of Patent Examining Procedure will provide examples as to when it would be appropriate for the Board to decide that an oral hearing is not necessary. Currently, those examples include those where the Board has become convinced, prior to hearing, that an application must be remanded for further consideration prior to evaluating the merits of the appeal or that the examiner's position cannot be sustained in any event.

Comment 79: Three comments note that § 41.50(a)(2) did not set any time limit for taking action to respond to a supplemental examiner's answer written in response to a remand by the Board for further consideration of a rejection.

Answer: The comment has been adopted. Section 41.50(a)(2) has been amended to provide a two-month period for response.

Comment 80: One comment requests that each action and decision of the Board should explicitly set forth the options, time limits, and extension of time practice available for taking further action.

Answer: The Board will consider including options, time limits, and extension of time practice in its decision.

Comment 81: Two comments inquire as to the justification for dismissal of an appeal of all claims (proposed §§ 41.50(a)(2) and 41.50(d)) rather than those that may be subject to a new rejection as in proposed § 41.39(b). One comment urged that in the absence of a compelling reason to treat these situations in a different manner that the Office adopt the practice that results in the dismissal of the appeal only as to the claims affected by the Office action. The other comment urged with respect to § 41.50(d) that the dismissal penalty for non-response be removed and that the Board be permitted to make any appropriate presumptions in view of the non-response.

Answer: We will adopt the suggestion to the following extent. Section 41.50(a)(2) has been amended to provide that if a supplemental examiner's answer is written in response to a remand by the Board for further consideration of a rejection pursuant to § 41.50(a)(1), the appellant must exercise one of two options to avoid sua sponte dismissal of the appeal as to the claims subject to the rejection for which the Board has remanded the proceeding.

Section 41.50(d) has not been amended since it provides that failure to timely comply with an order of the Board may result in the sua sponte dismissal of the appeal. Thus, the Board may take the action that is appropriate under the facts of each proceeding.

Comment 82: One comment notes that proposed §§ 41.35(c) and 41.50(a)(1) provide for remand of an application to the examiner. The comment urges the Board to exercise the remand authority in a manner that takes into appropriate account the possible patent term extension/adjustment consequences of a remand that is tantamount to a reversal of the rejections of at least one claim in an appeal. In taking actions to dispose of appeals, the comment states that the Board needs to be aware of and take into appropriate account the possible implications of its actions on eligibility for patent term extension/adjustment and seek to avoid taking action that would possibly deny some applicants potentially very valuable rights under 35 U.S.C. 154(b). As one example, the comment asserts that the Board should not remand an appeal to the examiner when the examiner has failed to establish a prima facie case of unpatentability, but instead the Board should reverse the rejection(s) and permit the examiner to take appropriate action when the file is returned to the jurisdiction of the examining group. Another comment suggests that the examples of situations where the Board may remand an appeal to the examiner made in the background discussion of proposed § 41.50(a)(2) be deleted and that the Board in fact discontinue the practice covered by the examples. The comment states that the Board is an impartial panel resolving disputes between appellants and examiners and that no special consideration should be given by the Board to an examiner's position. The comment states that the examiner must establish a prima facie case of anticipation or obviousness, which the appellant must persuasively demonstrate to be in error. The comment asserts that just as the Board would not give the appellant an opportunity to present a more persuasive traversal, the Board should not give an opportunity to the examiner to more clearly meet his or her burden. The comment expresses the view that if a prima facie case of unpatentability was not adequately made by the examiner, the rejection should be reversed.

Answer: The comments are not adopted. It is within the discretion of the panel of the Board deciding the appeal to determine the best course of action. A panel may conclude that the best course of action in deciding a rejection is to either (1) remand to the examiner for further consideration of the rejection; (2) order the appellant to brief additionally a matter concerning the rejection; (3) reverse or vacate the rejection (with or without a remand to the examiner for further action); or (4) affirm the rejection. While the examples of situations where the Board may remand an appeal to the examiner made in the background discussion of proposed § 41.50(a)(2) could also be examples of situations where the Board may reverse the rejection, the Office believes that appellants' rights are protected in such a situation since appellants under the provisions of § 41.50(a)(2) can choose to respond to any supplemental examiner's answer written in response to a remand by the Board for further consideration of a rejection by either (1) requesting that prosecution be reopened before the examiner by filing a reply under § 1.111 of this title with or without amendment or submission of affidavits (§§ 1.130, 1.131 or 1.132 of this title) or other evidence; or (2) requesting that the appeal be maintained by filing a reply brief as provided in § 41.41. The panel of Administrative Patent Judges deciding the appeal will determine if and when a remand is appropriate. A final decision on appeal can only be reached when the record is susceptible to meaningful review. A significant number of remands result from cases that have been assigned to a merits panel for final decision where the record is unclear. For example, it has been the Board's experience that cases in which amendments and additional evidence have been filed during the appeal process including with the Reply Brief oftentimes have a confusing record. Sometimes the record does not indicate that the examiner considered the amendment and/or additional evidence or the record indicates that the amendment and/or additional evidence has been "entered" by the examiner without comment. Such cases need to be remanded/returned to the examiner to clarify the record as to the status of the amendment and/or additional evidence and if the material is entered have the examiner enter a substantive response. It may be that upon remand the examiner will determine upon a clarified record that the claims are patentable and pass the case to issue. It is expected that the proposed limits on the presentation of amendments and/or evidence after the notice of appeal (see § 41.33) has been filed will minimize such occurrences.

Comment 83: Two comments state that the proposed requirement of § 41.52(a) that in a request for rehearing the appellant may only rely on evidence that has been previously entered and considered by the primary examiner and present argument that has been relied upon in the brief or reply brief was too rigid. The comments believe that an appellant should be able to make an argument not present in the briefs if good cause is shown such as new law or facts.

Answer: Section 41.52(a) has been amended to permit the appellant, upon a showing of good cause, to rely on a new argument based upon a recent relevant decision of either the Board or a Federal Court.

Part 41, Subpart C—Inter Partes Appeals

Comment 84: One comment points out that the recitation in proposed § 41.66(a) that, "if any party to the proceeding is entitled to file an appeal or cross appeal but fails to timely do so," appellants brief will be due upon "the expiration of time for filing (by the last party entitled to do so) such notice of appeal or cross appeal" is confusing. The comment points out that it is not clear how an appellant A can know whether another party B will file a notice of appeal or cross appeal on the last day of the time period for filing same. If such a notice of appeal is then filed by party B, party A's appellant brief would be due two months from the date the notice of appeal is filed by party B, whereas if party B does not file it, party A's appellant brief would be due by party A's "original" last day for filing the appellant brief.

Answer: The comment has been adopted. The comment suggests that the rule, as proposed, was open to more than one interpretation, because it can be read to suggest that the brief is due upon "the expiration of time for filing (by the last party entitled to do so) such notice of appeal or cross appeal." While a fair reading of the rule as proposed would be that the brief must be filed within two months from the latest filing of the last-filed notice of appeal or cross appeal, or within two months from the expiration of time for filing such notice of appeal or cross-appeal, the comment's interpretation is also tenable. Accordingly, in the interest of clarity the rule has been amended to more clearly state that the brief is due within two months from the latest filed notice of appeal or cross appeal or within two months from the expiration of the time for filing a notice of appeal or cross appeal, whichever is later.

Comment 85: One comment suggests that § 41.68(a)(4) be amended by adding the word "other" to indicate that "[a] requester's respondent brief may not address any brief of any other requester." The comment states that the requester should be able to refer to any arguments made in a previously filed brief by that same requester.

Answer: The comment has been adopted. The last sentence of former § 1.967(a) (2003) provided that "a third party respondent brief may not address any brief of any other third party." This prohibition was to prevent multiple requesters from addressing the briefs of other requesters which would make the proceeding unmanageable. Former § 1.967 (2003) contained no prohibition preventing a requester from referring to its own previously filed brief. The word "other" was inadvertently omitted from the proposed § 41.68. Accordingly, the comment is adopted and the word "other" has been inserted in the rule as suggested.

Comment 86: One comment suggests that paragraphs (b) and (c) of § 41.69 be eliminated from the rule. The comment urges that the examiner should not be required to reopen prosecution if he or she is persuaded by the brief filed that a rejected claim is in fact patentable or that a claim found patentable is in fact unpatentable. The comment further suggests that proposed § 41.69(d) should be amended to require that "any proposed new ground of rejection, or any proposed new determination not to make a proposed rejection, shall be stated by the examiner in a separate section of the examiner's *Answer*, and shall include reasons why the examiner has been persuaded to propose such new ground of rejection or new determination not to make a proposed rejection, referring to the corresponding arguments in the requester's or owner's briefs."

Answer: The comment has not been adopted. Section 41.69 was proposed to generally incorporate the requirements of former § 1.969 (2003) which relate to the examiner's *Answer*. The rule making did not propose to change the current practice set forth in paragraphs (b) and (c) of § 41.69 and paragraphs (b) and (c) of former § 1.969 (2003). The comment has been forwarded to the Deputy Commissioner for Patent Examination Policy for further consideration.

Part 41, Subpart D—Contested Cases

Comment 87: One comment suggests that subpart D be modified to take title proceedings under 42 U.S.C. 2182(4) and 2457(d) into consideration. The comment does not suggest specific modification.

Answer: Subpart D is designed to address all contested proceedings that currently occur before the Board, including title proceedings under 42 U.S.C. 2182(4) and 2457(d). Title proceedings constitute a very small percentage of the overall number of contested cases (about 1%). If a need arises for special rules specific to the title cases, they would most likely be placed in a new subpart, just as subpart E addresses specific issues arising in patent interferences.

Comment 88: One comment suggests that § 41.102(a) is confusing since it suggests that examination must be complete before a contested case will be initiated, but that the declaration of an interference means that the question of priority has yet to be resolved. The comment urges that the phrase "interfering subject matter * * * which is patentable to the applicant subject to a judgment in an interference" from § 1.607(b) (2003) be included in § 41.102(a).

Answer: Section 41.102(a) has been amended to include similar language to that suggested, but it has been generalized since subpart D is not limited to interferences. For instance, patentability might not be an issue in a title proceeding under 42 U.S.C. 2182(4) and 2457(d).

Comment 89: Two comments express concern that the filing of a reexamination could delay the initiation of a contested case.

Answer: A simultaneously pending reexamination and interference involving the same patent has been very rare. Section 41.102 provides the Board with the flexibility to tailor a specific solution to such occurrences as they arise. See also § 1.565(e) and § 1.993. The requirement under 35 U.S.C. 305 and 314(c) for special dispatch in reexaminations will inform any solution that the Board may craft.

Comment 90: Section 41.103 suspends action in any case involved in a contested case before the Board except as the Board may order. Two comments request that § 41.103 be modified to require the Board to provide notice of when the suspension is lifted.

Answer: The judgment in the involved case will constitute adequate notice that the suspension is no longer in effect. Moreover, the suspension only applies to involved files, not to ancillary files like benefit files, which may still be pending. A response to any outstanding Office action in an ancillary file should be timely filed to avoid abandonment.

Comment 91: Two comments oppose § 41.104(b), which allows an administrative patent judge to waive or suspend a rule in subpart D subject to such conditions as the administrative patent judge may impose. Both comments fear that the rule will permit arbitrariness.

Answer: The rule does not authorize arbitrariness, which if it were to occur would be subject to correction. See § 41.125(c)(5). Moreover, the rule reflects current practice under the Standing Order at ¶ 21, under which an administrative patent judge may modify the Standing Order. The present rules incorporate many portions of the Standing Order and, consequently, incorporate the provision of the Standing Order that permits their modification.

There is a tension between adding so much detail in the rules that they become too constrictive and including so little that parties lack guidance about what is required. Section 41.104(b) is intended to strike a balance by letting the rules include more detail, and thus provide a basis for counseling clients, but also provide a remedy for when a rule does not facilitate the goal of an inexpensive, fast, and fair proceeding. See § 41.1(b). The responses that the Board has received regarding increased flexibility in interferences have been generally good. Rather than eliminate the flexibility provided in § 41.104, lest it be abused, it is better to address any abuse as it arises. No comment objected to § 41.104(c), which provides similar flexibility for the setting of times.

Comment 92: One comment discusses an instance under the previous rules in which, the comment suggests, a waiver occurred that was not fair.

Answer: Too few details were provided to make discussion of the example feasible. However, if a waiver is arbitrary or unfair, the injured party has a remedy before the Board, § 41.125(c)(5), and during subsequent judicial review. It is up to the party to preserve the issue and to pursue its remedies.

Comment 93: One comment is concerned that such waivers could change the substantive requirements for motions.

Answer: The Board has cautioned against confusing procedural requirements for motions set in the rules with the substantive requirements of the patent statutes and case law necessary to prevail in a motion. *Hillman* v. *Shyamala*, 55 USPQ2d 1220, 1221 (BPAI 2000). Moreover, only the general contested case rules in subpart D are subject to a § 41.104(b) waiver. The presumptions and showings required in subpart E are outside the scope of § 41.104(b).

Comment 94: One comment urges that a waiver provision in the rules is

contrary to administrative law, citing *United States* v. *Nixon*, 418 U.S. 683, 686 (1974).

Answer: The cited page has no bearing on waiver of rules. The case read as a whole supports the rule. At page 696, the Court explained that the Attorney General must comply with his own rule precisely because he had not reserved the power to act otherwise without changing the rule. In § 41.104(b), the rule specifically authorizes the Board to change a rule within subpart D. The rule is consistent with statute as well since a procedural requirement can be changed without notice and comment rule making. 5 U.S.C. 553.

Comment 95: One comment urges modification of § 41.106(a)(1), which requires all papers from a party to be the same size absent some compelling reason for a larger paper size. The comment suggests saying "different" rather than "larger".

Answer: Larger in this context means larger in any dimension that prevents reproduction without loss of detail. A smaller exhibit can be reproduced on standard (A4 or 8½ x 11″) paper without loss of detail. Indeed, it may sometimes be advisable to enlarge a small exhibit to take advantage of the additional space. Many larger exhibits can be effectively reduced to a standard paper size without loss of detail. The rule recognizes, however, that many exhibits will not be readily reduced to a standard paper size. Consequently, the rule provides parties with the flexibility to use a larger paper size when it is truly necessary.

Comment 96: Section 41.106(a)(2)(ii) requires papers to be double-spaced except for headings, signature blocks and certificates of service. One comment suggests that tables of contents should be added to the list of exceptions.

Answer: Section 41.106(a)(2)(ii) has been modified to include tables of contents, tables of authorities, and indices.

Comment 97: A second comment suggests additional formatting requirements, particularly a page limit or word count along the lines of Federal Rule of Appellate Procedure 32(a)(7).

Answer: The suggestion is outside the scope of what was proposed, but may be addressed in a pilot program or in a future rule making. For instance, in the electronic filing pilot program for interferences, word-counts might be permitted as an incentive to parties to file text-searchable papers.

Comment 98: One comment opposes the requirement in § 41.106(b)(1)(ii) and (b)(2) for a distinctive cover sheet and two-hole punched paper, respectively. The comment suggests that the Board provide these formalities on its own.

Answer: These requirements were introduced to facilitate interference paper handling within the Board. Experience over the past five years, since these requirements were introduced, show a vast improvement over past practice. All of that improvement would be lost if the comment were adopted. As the supplementary information explained, these formalities are based on the practices of courts that regularly review Board decisions.

These requirements do not apply to interferences in the electronic filing pilot program and would not likely apply in any permanent electronic filing system. The Office expects to develop an electronic filing system for contested cases over the next several years. In the meantime, participation in the pilot program will permit a party to avoid these two formalities.

Comment 99: One comment opposes the prohibition in § 41.106(b)(3) on incorporation by reference from other papers and on combined papers.

Answer: Incorporation by reference and combination of papers are short-sighted remedies for a party. While they may reduce the length of a paper, they do so at the cost of obscuring the flow of the party's argument and often result in disjointed presentations lacking sufficient connecting explanation. Frustrating and confusing the decision-maker is never a wise strategy. The rule prohibits a practice that parties would be well-advised to avoid in any case.

Comment 100: One comment urges that a rule is not the appropriate place for § 41.106(b) formalities because a petition would be required for relief.

Answer: The formal requirements in § 41.106(b) had previously been promulgated through the Standing Order. Whether in the Standing Order or in a rule in subpart D, the remedy would be the same: A miscellaneous motion (§ 41.121(a)(3)) for relief from the requirement rather than a petition. Note that under § 41.104(a) waiver of a rule in subpart D can be granted on a motion. The reason for placing these requirements in the rule is to reflect the fact that they are presently required for nearly every paper in every case.

Comment 101: One comment seeks clarification of whether the extra copy required under § 41.106(c) applies to papers filed electronically.

Answer: Electronic filing is currently a pilot program and is administered under an additional order that waives the extra copy requirement. As noted above, electronic filing will likely eliminate many of the formalities now associated with filing in paper. Once an electronic filing system for contested cases has been developed, it is expected that a rule will be proposed to address the separate requirements for such filings.

Comment 102: Two comments call for § 41.106(d) to address hand filing expressly. One of the comments requests adoption of the current practice permitting hand filing at the Board by 10 a.m. the next business day after the due date. The other comment recommends addressing hand filing with the Office mail room and overnight delivery services.

Answer: Section 41.106(d)(2) has been amended to list hand filing expressly along with electronic filing as a filing mode that the Board may authorize by order. Hand filing with the Office mail room is not equivalent to hand filing with the Board since even subtle mistakes in the way the paper is addressed can result in its being misdirected within the Office for long periods of time.

As a matter of policy, the Office has accepted the EXPRESS MAIL® service of the United States Postal Service as equivalent to hand filing with the Office. A properly addressed EXPRESS MAIL® filing is also likely to arrive promptly. Use of overnight delivery services and other forms of hand delivery to the Board will continue to be treated by order. Although the current practice of hand filing at the Board is popular, uncertainties regarding security and access to the new Board facilities in Alexandria, Virginia, counsel against codifying this practice at this time despite its present success.

Comment 103: One comment suggests clarifying § 41.106(e)(3) to state that overnight delivery is required as the alternative to EXPRESS MAIL®.

Answer: Other forms of prompt delivery might also be appropriate, including facsimile service or electronic service (with Board authorization). The purpose of the rule is to provide parties with some latitude in meeting the service requirement, while still requiring promptness. In any case, a party whose mode of service takes much more than a day may find its options limited by order.

Comment 104: Four comments request clarification of § 41.106(e)(4) about whether the date to be excluded from calculating response periods is the date of service or the date that service is received.

Answer: The rule has been amended to "The date of service" to be consistent with § 41.123 and § 41.155.

Comment 105: Section 41.106(f)(3)(i) requires a certificate of service to name

each paper served. The comments suggest that the use of "each" is confusing since the paper named is the same paper that incorporates the certificate of service under § 41.106(f)(1).

Answer: The proposed rule referred to exhibits, which can be served as a group. To address the concern raised by the comments, § 41.106(f)(3)(i)–(iii) have been reordered to place paragraph (i) last. Moreover, the paragraph in question has been revised to say "for exhibits filed as a group, the name and number of each exhibit served."

Comment 106: One comment suggests that § 41.108, which addresses identification of counsel, include a reference to registered patent agents who are not attorneys.

Answer: Section 41.108 uses "counsel" to be consistent with § 41.5. Both rules are intended to include, not exclude, registered patent practitioners and any person recognized to act pro hac vice.

Comment 107: Section 41.109(a) does not retain the practice of § 1.612(a) (2003) of withholding access to § 1.131 and § 1.608 (2003) (now § 41.202(d)) declarations in involved applications. Three comments request that the practice be restored. Two of the comments suggest that the practice be restored for all unpublished applications, or equivalently that pre-29 November 2000 applications be grandfathered out of the rule. One comment suggests that the practice be restored for § 41.202(d) showings because, unlike § 1.131 declarations, they relate directly to the junior party's priority case without otherwise reflecting on patentability and thus, according to the comment, only serve to expose the junior party's priority case.

Answer: Part of the original intent of the rule change was to balance the playing field between applicants and patentees since any § 1.131 or § 1.608 (2003) declaration in a patent would be publicly available. In many cases, the junior party is a patentee so no showing will have been filed or it will already be publicly available. Moreover, while the declarations were removed under § 1.612(a) (2003), other papers that discussed the declarations were not, so the protection offered under the rule was not very extensive.

The difference suggested in one comment between declarations under § 1.131 and § 1.608 (2003) is not so great since in both cases the Office will have relied on the declaration to reach the conclusion that all patentability issues in the application other than priority have been resolved. The showing under § 41.202(d) does not require the applicant to put on its entire priority case. It only need put on enough of a case to show priority assuming the opposing party puts on no case at all. Often this will be much less than the applicant could or ultimately will prove. For instance, if the applicant has a filing date of August 15, while the patentee's application was filed on August 7 with an inventor's declaration dated August 5, then a proof of conception before August 5 and diligence from at least August 4 will generally suffice.

In any case, starting later this year, these papers will be available over the internet in published applications with an image file wrapper. Soon it will not make sense to try to withhold a § 1.131 declaration or a § 41.202(d) showing in most cases because it will have already been publicly available.

There may be some instances when the paper has not been made public and an applicant could show undue prejudice if the paper were made available to its opponent. Such cases are best left to case-by-case development. An applicant may promptly move (§ 41.121(a)(3)) as soon as the interference is declared to have its § 41.202 showing withheld. If the Board grants a motion to withhold a § 41.202(d) showing, it will advise the Office of Public Records, which may then remove the showing from the file after it has been printed.

Comment 108: One comment suggests that § 41.109(a) permit the requesting of certified copies. According to the comment, the Office of Public Records currently fills requests for certified copies in interferences by sending uncertified copies, which the comment asserts are more likely to have missing pages.

Answer: Nothing in § 41.109(a) prevents a party from requesting a certified copy. The rest of the comment is directed to operation of the Office of Public Records, a matter outside the scope of this rule making, and would not be solved by changing the rule as requested. Instead, the comment has been referred to the Office of Public Records.

The image file wrapper, which is now the official record of the application within the Office, should be much less prone to copying mistakes. Consequently, if pages appear to be missing, the absence of those pages accurately reflects the official contents of the file.

Comment 109: Section 41.110(a) requires each party to file a clean copy of its involved claims. One comment suggests that the requirement include uninvolved claims in the involved application or patent in case a party subsequently moves to add, or designate as corresponding to a count, one or more uninvolved claims.

Answer: The present rule strikes a balance between having a clear statement of the claims and imposing costs on parties by making a party responsible for its own involved claims. A clean copy of any claim to be added should be included with any motion to add the claim, § 41.110(c). Imposing the additional cost of providing clean copies for uninvolved claims against the possibility that one might be added would typically be an unnecessary added expense. Nothing in the rule bars a party from filing a clean copy of uninvolved claims as well if doing so would be easier for the party filing the clean copy.

Comment 110: One comment urges that annotated claims should not be required until preliminary motions, oppositions, and replies have been filed. A second comment suggests that annotated claims not be required until after preliminary motions have been decided. Four comments express concern about the potential estoppel effect of filing annotated claims.

Answer: Notice is a core function of a patent claim. *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1028 (Fed. Cir. 1997). An applicant has wide latitude to claim its invention as it sees fit, but the vital notice function of claims imposes a corresponding duty to claim clearly and distinctly. *Id.*, 127 F.3d at 1056, 44 USPQ2d at 1029. An attempt to avoid prosecution estoppel is never a valid reason for an applicant to evade a clear indication of what its claim means. *Id.*, 127 F.3d at 1056, 44 USPQ2d at 1030. The suggestion that a party should not be accountable for the meaning of its claims is utterly inconsistent with the purpose and sound functioning of the patent system.

Claim annotation is vital to the efficient administration of contested cases because it provides the Board and opposing parties with a starting point for understanding how the party intends its claim to be read. It also serves as a stimulus for the parties to take a close look at their claims to see if there are latent problems that need to be addressed before motions are filed.

The Board expects the claim annotation to be complete and accurate. As a practical matter, the Board has permitted parties to point out additional support consistent with their claim annotation. In the event that a party makes a mistake, it can seek correction through a miscellaneous motion (§ 41.121(a)(3)). Parties moving to correct, and parties opposing such

motions, should note that prejudice to the opposing party will be an important element in deciding whether to grant relief.

Comment 111: One comment opposes what it contends is a requirement to submit annotated claims more than once.

Answer: The rule does not require more than one annotation for each claim. No additional annotations are required unless a claim is added or amended (§ 41.110(c)(3)). If a claim is added or amended, it is a new claim and requires annotation. Note that the requirement could be waived at a conference call discussing the motion; for instance, a minor grammatical amendment to a claim that has otherwise been properly annotated might not require a new annotation.

Comment 112: Three comments suggest that the phrase "add a reissue claim" in § 41.110(c) is either a mistake or too narrow.

Answer: Section 41.110(c) is amended to delete the word reissue. The intent of the rule is to require a clean copy, a claim chart showing written description, and an annotated copy (when applicable) of any added claim, including added claims in a reissue application.

Comment 113: One comment urges that the requirements of § 41.120(a), regarding the notice of bases for relief, is too vague, particularly given the consequences that attend such notices in § 41.120(b) and (c). The comment suggests that the current motions list practice be adopted instead.

Answer: Section 41.120 authorizes the Board to require a notice outlining how a party intends to litigate a contested case. Since the type of notice will vary with the type of case, greater detail in the rule is not possible. Moreover, the notice is not automatically required except in the case of a priority statement under 41.204(a). Hence, when the Board requires such notice, it will also specify what must be shown.

Comment 114: One comment opposes § 41.120(b), which requires a party filing a notice of basis for relief to file only motions consistent with the notice. The comment considers the rule to be a trap for the unwary and particularly objects to the word "ambiguities", which may be construed against a party.

Answer: Under existing practice for preliminary statements, which are the closest present analog of the notices under § 41.120, a party would be strictly held to its alleged dates with "[d]oubts as to definiteness or sufficiency of any allegation * * * resolved against the party filing the statement", § 1.629(a) (2003). Similarly, § 1.629(e) (2003) noted that a preliminary statement was not evidence for a party, but left open the possibility that a party would be estopped from denying an allegation in its preliminary statement. Preliminary statements have been routinely used as admissions, for instance in the context of an order to show cause under § 1.640(d)(3) (2003). A comparable practice has existed with regard to § 1.608 (2003) declarations and summary judgment under § 1.617 (2003).

Section 41.120(b) does not change the requirements for finding an admission, but simply places a party on notice that its statements could be used as an admission.

Comment 115: One comment cites cases for the proposition that the standard for finding an admission is high. *Harner* v. *Barron*, 215 USPQ 743 (Comm'r Pats. 1981); *Flehmig* v. *Giesa*, 13 USPQ2d 1052 (BPAI 1989); *Suh* v. *Hoefle*, 23 USPQ2d 1321 (BPAI 1991); *Issidorides* v. *Ley*, 4 USPQ2d 1854 (BPAI 1985); *Ex parte McGaughey*, 6 USPQ2d 1334 (BPAI 1988). The comment does not, however, point to the parts of the cases that the comment considers to be inconsistent with the rule.

Answer: The cases provide examples where Board panels, or in one case a Commissioner reviewing the action of a Board employee, found a lack of an admission of the facts of the particular case. None creates a bar against finding admissions. The only effect that § 41.120(b) might have on these precedents is that, by placing the party explicitly on notice that its statements might be treated as an admission, it might make the showing of an admission somewhat easier.

Comment 116: One comment urges that the standard for correcting a notice of basis for relief in § 41.120(c) is like the standard for correcting a preliminary statement, and thus too strict for correcting motions lists.

Answer: Under § 41.204(a), the priority statement is a kind of notice of basis for relief, so the preliminary statement correction practice is appropriate in such cases. In other cases where the Board has required such notice and specified what must be shown, the strict interests-of-justice standard is also appropriate because the party has actual notice that it will be strictly bound. The rule does not prevent the Board from requiring other notices that are easier to correct.

Comment 117: One comment opposes § 41.121(a) because it views simultaneous filing of preliminary motions and priority motions as onerous and as unfair to the target of a provoked interference. A second comment applauds the removal of the prohibition on simultaneous filing of preliminary and priority motions.

Answer: The rule does not require a change in current practice and ordinarily will not result in simultaneous filing of such motions. The Board will continue to set the times for filing motions (§ 41.123(a)), including setting different times for different motions.

Preliminary motions—those affecting threshold issues, count scope, and benefit—will generally precede any priority motion since a decision on such motions will affect the scope and complexity of any priority case that must be presented. The main effect of the rule is to have the priority case presented as a motion whenever it is filed. The Board will have the authority to advance consideration of priority issues in an appropriate case, but such cases are expected to be exceptional.

Comment 118: One comment views § 41.121(a)(1) as unduly circumscribing the Board's authority under 35 U.S.C. 135(a) to reach patentability questions in an interference. The comment suggests that a "when justice requires" test for reaching extrinsic patentability issues would be desirable.

Answer: The rule does not limit the Board's authority to address patentability questions as long as they relate to a change in the scope of the interference or to a change in the accorded benefit, or are otherwise likely to lead to judgment in the case. It does not seem likely that justice would require the Board to address a patentability issue that cannot otherwise be plausibly related to the issues in the contested case. If a patentability issue arises that cannot be reached under § 41.121, but should be reached in the interest of justice and is otherwise within the scope of the Board's authority, a party could seek relief under § 41.104 by filing a miscellaneous motion (§ 41.121(a)(3)).

Comment 119: One comment suggests that § 41.121(a)(2) be amended to remove the authority to cancel a claim. The comment suggests that § 41.121(a)(2) is unfair because a patentee cannot cancel a claim. The comment indicates that the option of canceling a claim might be misunderstood by a party as being without cost.

Answer: A patentee can disclaim a claim under 35 U.S.C. 253.

Authorization to cancel a claim does not mean that no consequence would attach to the cancellation. For instance, cancellation of all involved claims would result in judgment against the

canceling party (§ 41.127(b)(2)). Cancellation of a claim in response to a motion attacking the claim would be a concession of the issue with respect to that claim and would create an estoppel (§ 41.127(a)), just as amending a claim can create an estoppel. Section 41.121(a)(2) is amended to remove claim cancelling as an express option to avoid its being requested too casually, although cancellation and disclaiming remain options under the "otherwise cure a defect" provision of § 41.121(a)(2).

Comment 120: Three comments suggest that a preponderance of the evidence standard be added to § 41.121(b).

Answer: Not all issues arising by motion are subject to a preponderance of the evidence standard. For instance, a junior party that filed its application after a patent issued to the senior party would have to prove priority under the clear and convincing evidence standard (§ 41.207(a)(2)). The default evidentiary standard in civil proceedings is the preponderance of the evidence standard. *Price* v. *Symsek*, 988 F.2d 1187, 1193, 26 USPQ2d 1031, 1035 (Fed. Cir. 1993). Codifying the default standard, would require the rules to list every exception. Consequently, the suggestion is more likely to cause confusion than to resolve it.

Comment 121: One comment notes the elimination from § 41.121(c) of precise directions for specific kinds of motions like those found in § 1.637 (2003). The comment expresses the hope that the requirements of § 1.637 (2003) not linger as an unwritten requirement.

Answer: Section 41.121(c) contains general requirements for the contents of motions. Some § 1.637-like requirements were proposed in § 41.208, but most have not been adopted in this final rule.

Section 1.637 (2003) attempted to provide movants with enough detail to avoid summary dismissal or denial. In practice, however, the rule often proved to be either over-inclusive, adding unnecessary cost, or under-inclusive, leading to dismissal or denial anyway. See *Hillman*, 55 USPQ2d at 1221 (denying motion despite compliance with § 1.637 (2003) for failure to carry its burden of proof). Ultimately, a movant must prove its case substantively whether a rule like § 1.637 (2003) exists or not. The Board may develop practice notes as its experience with the new rules increases, in which case parties would be given notice of the practice notes.

Comment 122: One comment suggests that § 41.121(c)(1)(ii) require that each material fact be stated in a single sentence.

Answer: Material facts should be stated in a manner that permits the opposing party to admit or deny the fact readily. Multi-sentence facts place a burden on the opposing party to parse the stated fact for portions that can be admitted or denied. The result is a complex tangle that does not facilitate decision-making. Even long, compound sentences are abusive. Section 41.121(c)(1)(ii) has been amended to require a statement of facts.

Section 41.121(d) has been renumbered as § 41.121(f) and a new § 41.121(d) has been inserted to address the form and content of the statement of material facts. A single-sentence requirement for material facts is added at § 41.121(d)(1).

Comment 123: One comment suggests an amendment to § 41.121(c)(1)(iii) to limit what it sees as the open-ended obligation of a party adding a claim in a contested case to address every rejection that could conceivably be made based on the prosecution history.

Answer: No such unlimited obligation exists. Generally, the obligation to "prove patentability" has been limited to showing compliance with the written description requirement of 35 U.S.C. 112(1) except where the party reasonably has actual notice that other patentability problems exist. Typically, such notice is provided by a prior rejection in the prosecution history of the involved application or patent or by a substantive motion by the opposing party.

If an opponent believes the movant has not met this burden, it should raise and explain the issue in its opposition. The Board views with disfavor oppositions that merely point out the problem and then do not explain it, hoping to enlist the Board's help in making the rejection. Finally, if a party believes that it did not have adequate notice of the problem, it should explain the lack of notice in its reply and then address the problem on the merits. In any case, it would be difficult to craft a rule that would cover all or even most of the possibilities that will arise.

Comment 124: Another comment suggests that the requirement in § 41.121(c)(1)(iii) for "a detailed explanation of the significance of the evidence" be met by citation to the specific numbered material fact or by citation to the specific portion of an exhibit.

Answer: The rule permits a party to cite to a particular material fact or portion of an exhibit, but mere citation to a fact is not an explanation of the fact. One purpose of an argument is to provide context and meaning to the relevant facts. A party that simply cites to facts without explaining them is effectively recruiting the opposing party and the Board to make out its case. The burden for explaining what the evidence means and how it justifies the relief sought in the paper remains with the party filing the paper.

Comment 125: Section 41.121(c)(2) requires compliance with any rule in 37 CFR part 1 that would ordinarily govern the relief sought if it were sought outside the context of a contested case within the Board's jurisdiction. One comment suggests requiring that a party moving to add a reissue claim also file a reissue declaration or supplemental reissue declaration addressing the claim.

Answer: One problem with the suggestion is that the movant might not be the reissue applicant. Rules cannot address every possible contingency. A party that believes it is harmed by the opponent's inadequate reissue declaration can address the problem in its opposition or can move for relief in a miscellaneous motion (§ 41.121(a)(3)) prior to filing its opposition.

Comment 126: Section 41.121(c)(4) provides that any material fact not denied will be considered admitted. One comment suggests that a fact only be considered admitted if it is not denied and it is "placed in issue by the parties or the Board".

Answer: The first comment is not adopted because the mere inclusion of the stated fact in a paper places the fact in issue. Any other approach would lead to fruitless argument about whether a fact was placed in issue or not. If the comment is hinting that a party might use a statement of material fact to obtain an admission on an extraneous fact for ulterior purposes, the Board would like to be informed of such abuses as they occur.

Comment 127: One comment expresses concern about § 41.121(c)(4) because a party not otherwise obliged to respond to a statement of material fact (for instance, because it does not oppose the relief sought), might nevertheless feel obliged to file a paper in order to deny a stated fact it believes is wrong. The comment suggests that a party be permitted to respond "not admitted" to a fact that is not supported by the exhibits.

Answer: The comment is not adopted because a denial standing by itself can be helpful to the Board. The burden on a party to deny stated facts it believes are wrong is not very great. Moreover, a "not admitted" response is not helpful. If the party agrees with the fact despite the inadequacy of the exhibits,

then the proper course is to admit the fact or remain silent and let it be deemed admitted; otherwise, the party should deny the fact, if only to direct the Board's attention to the issue. Perhaps best of all, the party could alert the opposing party to the defect so that any flaw in the statement could be corrected before any response is due.

Comment 128: A new § 41.121(e) has been inserted to relocate the claim chart requirement of proposed § 41.208(d) into subpart D. Two comments address proposed § 41.208(d). One comment requests greater guidance on the form and content of the claim charts and on whether they count against any page limit. The other comment opposes the requirement as costly and of questionable use.

Answer: Claim charts permit a party to explain clearly and succinctly what it thinks a claim means in comparison to something else, such as another claim, a reference, or a specification. No form is specified in the rule because each party has an incentive to produce a clear claim chart that illustrates its point. The question about page limits is moot since the rules set no page limits.

Comment 129: Section 41.122 has been retitled "Oppositions and replies" and the content requirements of § 41.121(c)(4) have been moved to a new § 41.122(a). Proposed § 41.122 is now § 41.122(b). As proposed, § 41.122 addressed new arguments in oppositions and replies. One comment objects to the second and third sentences of § 41.122 regarding new arguments in oppositions and replies. The comment expresses concern that the second sentence limits the scope of opposition argument, but the comment does not give an example of its concern.

Answer: The second sentence of what is now § 41.122(b) was confusing and not necessary. It has been deleted.

Comment 130: One comment expresses concern that the third sentence of what is now § 41.122(b), which addresses replies, actually permits new arguments in the reply because a movant could use the reply to cure defects in the motion first noted in the opposition. The comment prefers the wording in § 1.638(b) (2003).

Answer: Section 1.638(b) (2003) is susceptible to the same misreading the comment proposes for § 41.122(b). Under either rule, an argument first made in a reply would not be attributed to the motion, and thus would not cure the deficiency of the motion.

Comment 131: One comment proposes that replies should not be automatic, but rather should require separate Board authorization or other additional regulation to prevent abuse.

Answer: As a broad proposition, the Board has considerable authority in setting times and determining the course of the proceeding and thus authority to file an opposition or reply should be viewed as a default rather than a right. Indeed, § 41.123(b)(2) makes clear that oppositions are not automatic for miscellaneous motions. It is fairly common for a party to be advised that no opposition or reply will be authorized in cases where such filings would be moot. Nevertheless, the filing of oppositions and replies is the default practice in contested cases before the Board. The rule has been written to reflect the default practice.

Comment 132: One comment objects to the default times in § 41.123(a) for filing oppositions and responsive motions. The comment expresses concern that the default times are too short and may otherwise not be appropriate in many cases.

Answer: The default times are set as defaults in the event that no times are set by order. See § 41.104(c). The expectation is that the Board official assigned to administer a case will tailor times appropriate to each case. As in the current practice, responsive motions will typically be filed before any oppositions are required.

Comment 133: Three comments oppose § 41.123(b)(2), regarding default times for oppositions and replies for miscellaneous motions, which all three agree are too short and are unnecessary.

Answer: The default times in § 41.123(b)(2) are the same as the default times in Standing Order ¶ 13.10.2. In practice, there has not been a problem because most miscellaneous motions are unopposed or are resolved in a telephone conference. An opposed motion must be authorized, § 41.123(b)(1)(ii), in which case the parties can suggest that different times for the opposition and reply be set in the order authorizing the motion.

Comment 134: One comment suggests that a rule analogous to § 1.639 (2003) be added to require exhibits be filed and served with the paper relying on the exhibit.

Answer: A new § 41.123(c) has been added to provide as a default that an exhibit must be filed and served with the first paper citing the exhibit. An exhibit that has already been filed should not be filed again (§ 41.7(b)) and one that has been served need not be served again. The current practice is to defer the filing of most exhibits until a time shortly before the motions will be decided.

Comment 135: Two comments suggest that § 41.124(c) is unclear regarding whether a party has twenty minutes of argument time for each issue or for all issues. The comments also suggest a mechanism for requesting additional time.

Answer: The default total time for oral argument for each party is twenty minutes regardless of the number of issues for which the argument has been granted. The Board may, however, authorize a different amount of time (§ 41.104(c)). As a practical matter, if questioning from the bench is active, then more time is accorded at the discretion of the presiding administrative patent judge. A party that knows in advance that it will need more time can seek more time by filing a miscellaneous motion (§ 41.121(a)(3)).

Comment 136: Two comments recommend that § 41.124(e) be amended to state that an oral argument transcript filed with the Board becomes part of the record.

Answer: Any paper that is properly filed becomes part of the record. Cf. § 41.7(a) providing for expungement from the record of improperly filed papers.

Comment 137: Two comments address § 41.125(a) regarding the order in which the Board addresses motions. One comment requests an opportunity for the parties to opine on the best order for consideration or to explain why deferral would make sense (or not).

Answer: At present, there are several mechanisms for expressing such opinions. Parties routinely mark papers as contingent on another motion, which implies an order for consideration. Moreover, the conferences for setting times often result in a discussion of whether the order for consideration of issues should be specified. For instance, threshold issues are often advanced to the point where briefing on threshold issues is completed before other motions are even filed. By contrast, antedating proofs related to patentability attacks under 35 U.S.C. 102(a) or (e), inventorship issues, and unenforceability issues are often deferred until the priority phase. Nothing in the rule bars or should even be viewed as discouraging parties from letting the Board know of a party's opinion on the order in which issues should be considered, provided that the parties keep in mind that the order is ultimately discretionary with the Board.

Comment 138: One comment suggests explicitly requiring the order to be "reasonable".

Answer: In this context, "reasonable" simply means no abuse of discretion. All Board discretionary actions are either reasonable or are subject to attack for abuse of discretion. Consequently, the amendment is superfluous.

Comment 139: One party suggests modifying § 41.125(c)(3)(ii) regarding the requirement that a rehearing request point specifically to "the place where the matter was previously addressed in a motion, opposition, or reply". According to the comment, the rule does not address instances where the Board reaches an issue sua sponte.

Answer: If a party believes that the Board improperly reached an issue sua sponte, then pointing out that the issue was not previously addressed in a motion, opposition, or reply would comply with § 41.125(c)(3)(ii). The party would still need to identify what the Board misapprehended or overlooked in reaching its decision (§ 41.125(c)(3)(i)).

Comment 140: One comment seeks clarification on whether the estoppel in § 41.127(a) applies to a party that "prevails" on priority, but is held to have unpatentable claims.

Answer: A party that loses on patentability for an involved claim will receive an adverse judgment (that is, lose) on patentability for that claim and consequently will be estopped with regard to the patentability of the subject matter of that claim. Note that since priority is effectively a question of unpatentability under 35 U.S.C. 102(g)(1), one never prevails on priority in any absolute sense: one can only lose on the issue of priority. In re Kyrides, 159 F.2d 1019, 1022, 73 USPQ 61, 63 (CCPA 1947).

Comment 141: Two comments note that abandonment or disclaimer of the invention of the count, both grounds for adverse judgment under § 1.662 (2003), are omitted from § 41.127(b). One comment seeks clarification of the practical effect of the omission. The other comment suggests that the abandonment ground be restored.

Answer: The abandonment and disclaimer of the invention grounds were omitted as redundant with other grounds listed in § 41.127(b). Hence, their omission should have no practical effect beyond making the rule shorter.

Comment 142: One comment makes two suggestions regarding requests for reconsideration under § 41.127(d). The first parallels the comment on sua sponte Board action under § 41.125(c)(3)(ii).

Answer: As with § 41.125(c)(3)(ii), if the problem asserted is that the Board reached an issue that was not raised, then pointing out that it was not raised complies with § 41.127(d).

Comment 143: The second suggestion is that the tolling of the time for seeking judicial review be automatic rather than discretionary with the Board.

Answer: The last sentence regarding tolling has been removed because it is unnecessary under current case law. A timely request for reconsideration automatically tolls the time for seeking judicial review. *In re Graves*, 69 F.3d 1147, 1151, 36 USPQ2d 1697, 1700 (Fed. Cir. 1995). Since the decision on rehearing on the judgment is itself a final decision from which judicial review may be sought, 35 U.S.C. 141, the decision on rehearing effectively resets the time for seeking judicial review.

Comment 144: One comment recommends that proposed § 41.128 regarding termination be restated to hold interferences to be merely suspended during the period of any judicial review. The comment opposes the rule as written because it places settlements during subsequent judicial review outside the purview of 35 U.S.C. 135(c). The comment is concerned that the rule creates a trap for parties settling during judicial review if a court subsequently disagrees with the Office's construction of 35 U.S.C. 135(c) and recommends that current Rule 661 be retained.

Answer: The Office has decided that, since termination has a meaning in 37 CFR part 1, subparts D and H, and in § 1.197, that differs from the meaning proposed in §§ 41.56, 41.83, and 41.128, confusion may result. Consequently, proposed §§ 41.56, 41.83, and 41.128 are deleted and § 41.129 is renumbered as § 41.128. Further, the text of former Rule 661 has been modified and incorporated into § 41.205(a) to define termination of an interference proceeding for purposes of 35 U.S.C. 135(c). Rule 41(d)(2), Fed. R. App. Procedure, controls when the mandate of the Court of Appeals will issue in the event that a party filed a petition for writ of certiorari to the United States Supreme Court. Unless a party petitioning for a writ of certiorari seeks and obtains a stay of the appellate court's mandate, proceedings will be considered terminated with the issuance of the mandate, as noted in Rule 197(b)(2) and 41.205(a).

Comment 145: One comment, while applauding the intent of now renumbered § 41.128(a) regarding sanctions, expresses concern that the word "misleading" in paragraph (a)(2) is too subjective and that the provision regarding dilatory tactics in paragraph (a)(3) is redundant with the other provisions of § 41.128(a).

Answer: While the word "misleading" calls for the exercise of judgment, it is no more subjective than "frivolous", which also occurs in paragraph (a)(2). Moreover, the sanction for misleading arguments addresses a problem distinct from frivolous arguments. The history of the use of sanctions at the Board suggests that parties are appropriately restrained in requesting sanctions and that the Board is similarly restrained in applying them. Note that a frivolous charge that an opponent's argument is misleading would be sanctionable. Consequently, the inclusion of misleading arguments as a basis for sanctions is both necessary and unlikely to result in significant abuse.

The provision in paragraph (a)(3) for sanctioning dilatory tactics is not necessarily redundant. For instance, if a party requests and is granted a delay in good faith, but subsequently abuses the delay, there might not be a violation of paragraphs (a)(1) or (a)(2). In any case, the inclusion of a sanction for dilatory tactics emphasizes the Board's commitment to avoiding undue delays in light of the availability of patent term adjustments under 35 U.S.C. 154(b)(1)(C)(i).

Comment 146: One comment recommends that § 41.150(b)(1)(i) be modified to add patent applications incorporated by reference into an involved patent or application to the list of materials that must be automatically served upon request.

Answer: The comment is adopted.

Comment 147: One comment suggests that § 41.150(c) regarding additional discovery expressly state that the "interests of justice" must include (1) a showing that the evidence requested in discovery is not available to the movant and (2) a showing as to why the evidence requested in discovery is necessary to establish a prima facie basis for relief, so as to preclude discovery fishing expeditions.

Answer: As in the current practice, requests for additional discovery under § 41.150(c) must be authorized (usually in the form of a miscellaneous motion under § 41.121(a)(3)), which has long offered sufficient protection against fishing expeditions.

Section 41.150(c) has been divided into two parts, with the addition of a paragraph (2) to restore the production of documents and things currently available under § 1.687(b) (2003).

Section 41.152 addresses when and how the Federal Rules of Evidence are applied. Section 41.156(c), regarding the determination of foreign law, has been relocated to § 41.152(d) because it can be an exception to the use of the Federal Rules of Evidence. Moreover, it is relevant to § 41.157 as well as § 41.156.

Comment 148: Four comments oppose the requirement in § 41.155(b)(1) for objections to be filed within five business days of service of evidence.

Answer: The time period is a default and can be extended on request (§§ 41.104(c) and 41.121(a)(3)). The five-

day period has been part of the Standing Order (¶ 14.1.1) for five years. In that time, very few problems have arisen with the requirement.

Comment 149: One comment requested that the provision in Standing Order ¶ 14.1.2 that an objection not made on the record is deemed waived be included in § 41.155(b)(1).

Answer: The requirement is preserved in § 41.155(c), which requires a party filing a motion to exclude to point to where the objection was made in the record. An objection first raised in a motion to exclude would be untimely (§ 41.4(b)).

Comment 150: One comment requests that § 41.155(b)(2), regarding the filing of supplemental evidence, be amended to clarify that additional supplementation is not permitted in response to an objection to the supplemental evidence.

Answer: The rules do not authorize a second objection. The party objecting should timely make all objections to the first evidence. The supplemental evidence will either cure the objections or it will fail to do so. If the party objecting believes the supplemental evidence does not cure the objection, then rather than file a second objection it should pursue its initial objection with a motion to exclude, explaining how the supplemental evidence failed to cure the defect.

Comment 151: One comment requested clarification of the relationship between § 41.156, which deals with compelled testimony and production, and § 41.150, which deals with discovery generally.

Answer: Since compelled testimony involves the issuance of a subpoena under 35 U.S.C. 24, it involves different considerations than other discovery and testimony.

Comment 152: One comment suggests that § 41.157(b)(2)(ii), regarding testimony outside the United States, permit parties to stipulate to the taking of such testimony.

Answer: The agreement of the parties to take testimony in a foreign country is only one of many factors that influence whether such testimony might be authorized.

Comment 153: One comment states that some practitioners abuse the opportunity to note errata in testimony. The comment suggests modifying § 41.157 to require that any correction must accurately reflect the questions posed and the answers provided.

Answer: Modifying the rule will not make it so. If a correction materially alters testimony, it may be a falsification of the testimony and may expose the party or the counsel to sanctions. A party who believes that an opponent's correction substantively changes the testimony should promptly bring the matter to the attention of the Board.

Part 41, Subpart E—Patent Interferences

Comment 154: Section 41.200(b) provides a rule of construction for claims in interferences. One comment suggests a rule for interpreting counts in light of the involved specifications.

Answer: The count defines the interfering subject matter, which in turn depends on what the parties are claiming. Consequently, as with claims, the primary meaning of the count must be based on the plain language of the count, but the corresponding claims can set bounds on what the count reasonably means, particularly when the count is defined in terms of a party's claim. Since § 41.200(b) provides for reference to the specification in interpreting claims, by extension the involved specifications can influence the broadest reasonable construction of the count via the claim defining the count.

Comment 155: One comment suggests that definitions in § 41.201 be numbered as subsections.

Answer: As noted with regard to § 41.2, the Office of the Federal Register discourages numbering definitions.

Comment 156: Section 41.201 defines "accorded benefit". One comment inquires whether the definition of "accorded benefit" is intended to cover applications filed in foreign countries, particularly prior to the critical dates for the North American Free Trade Agreement and the Uruguay Round Agreement Amendments. As the comment notes, the definition is based on 35 U.S.C. 102(g).

Answer: The definition is limited to what would constitute a constructive reduction to practice under 35 U.S.C. 102(g)(1), taking into account other relevant statutes like 35 U.S.C. 104, as well as relevant case law. The point of the revised rule is to focus on priority proofs rather than the less relevant right to benefit under 35 U.S.C. 120 and related statutes.

Comment 157: Section 41.201 also defines "constructive reduction to practice". Five comments address this definition. They broke into three overlapping groups. One group expresses concern that the phrase "constructive reduction to practice" has come to have other meanings, which could lead to confusion.

Answer: The problem the first group identifies pervades patent law, where concepts are tightly, but not always smoothly, integrated. The new rules shifted away from discussing constructive reduction to practice in terms of "benefit" because that term was causing confusion. The term "benefit" occurs much more commonly in the 35 U.S.C. 120 sense than in the interference sense. Unfortunately, all of the other candidates for succinctly expressing the key idea, like "anticipation", are also freighted with considerable non-interference implications. While "reduction to practice" is occasionally used in other contexts, its primary use has been associated with priority proofs. Hence the phrase "constructive reduction to practice" is the best choice, but the definition has been revised to tie it more closely with the idea of anticipation under 35 U.S.C. 102(g)(1). This change represents a clarification of, rather than a change to, the current practice.

Comment 158: A second group expresses concern that the scope of the rule could be read too narrowly, for instance, to exclude an express disclosure and enablement of a genus without any disclosure of a particular species within the genus when the subject matter of the count is generic.

Answer: This concern should also be resolved by refocusing the rule on anticipation. As with other forms of anticipation directed to claims, a constructive reduction to practice can be satisfied with a disclosure and enablement of the full scope of the count or with disclosure and enablement of a something within the scope of the count.

Comment 159: The final group suggests clarification of whether co-pendency in a chain of applications is required or that a requirement of co-pendency be included in the definition.

Answer: The requirement of co-pendency appears to be implicit in the law both by the exception for abandoned, suppressed, and concealed subject matter, and by the analogy to *In re Costello*, 717 F.2d 1346, 1350, 219 USPQ 389, 391 (Fed. Cir. 1983) (a 35 U.S.C. 102(e) case). The definition provided for "earliest constructive reduction to practice" makes clear that continuity is required. To clarify this point, the definition of "earliest constructive reduction to practice" has been relocated into, and amended to be consistent with, the revised definition of "constructive reduction to practice".

Comment 160: One comment suggests that the use of the phrase "patentably distinct" in the definition of "count" under § 41.201 could be confusing. The comment proposes a definition based on the test for interfering subject matter in § 41.203(a).

Answer: Two counts must be patentably distinct; if not, they define

the same invention and can only support a single count. The phrase patentably distinct comes from the case law dealing with separate counts in an interference. *Hester* v. *Allgeier,* 687 F.2d 464, 466, 215 USPQ 481, 482 (CCPA 1981). The phrase has an established meaning as a difference between subject matter that would have been neither anticipated nor obvious. *Aelony* v. *Arni,* 547 F.2d 566, 570, 192 USPQ 486, 490 (CCPA 1977). Patentable distinctness is a one-way test. It is sufficient if the subject matter of either count, treated as prior art, would not have anticipated or rendered obvious the subject matter of the other count. Two-way distinctness would also justify two counts, but is not required: it is more than what is required.

Comment 161: The comment further requests clarification on what date would apply for determining whether an additional reference was available to show obviousness.

Answer: Such a determination is outside the scope of this rule making and is better left to development through adjudication. Note that since a count controls what proofs are admissible, it will often be advisable to permit a second count at least until the facts surrounding priority are in the record.

Comment 162: One comment addresses the definition of "threshold issue" under § 41.201. It criticizes the narrowed application of 35 U.S.C. 135(b) as a threshold issue.

Answer: The 35 U.S.C. 135(b) bar and written description issues were defined as threshold issues to address perceived abuses of interference practice and, given their standing-like ability to end an interference quickly, have been defined narrowly for the purpose of threshold issues, without any intent to narrow them for the purposes of proving unpatentability generally.

In the case of a provoked interference, the 35 U.S.C. 135(b) bar and written description serve complementary functions. The 35 U.S.C. 135(b) bar is intended to provide a patentee (or published applicant) repose from any attack more than one year after issuance or publication of the interfering claim. In short, it bars a claim that an applicant might otherwise be entitled to receive had it been entered earlier.

The use of the 35 U.S.C. 135(b) bar as a threshold issue is limited to patents or applications of the movant because the entitlement to repose is personal to the patentee or published applicant. There is no third-party entitlement to repose, particularly since the movant asserting the bar may also believe it is also entitled to an interference with the third-party patent or published application that triggers the bar. Nothing in the definition of "threshold issue" prevents the movant from raising the bar as an ordinary attack on patentability. The suggested clarification is unnecessary because the rule does not change the requirements for proving the bar, but rather limits the instances in which the bar will be treated as a threshold issue.

Comment 163: The comment questions the inclusion of written description as a threshold issue under § 41.201.

Answer: Written description addresses the problem complementary to repose under 35 U.S.C. 135(b): the claim was timely, but lacks an adequate written description. The use of written description as a threshold issue responds to the perception that some applicants would copy a claim simply to provoke interferences to obtain an inter partes administrative challenge to a patent, regardless of whether the applicant had actually invented the same subject matter as the patentee had claimed. See *Snitzer* v. *Etzel,* 531 F.2d 1062, 1065, 189 USPQ 415, 417 (CCPA 1976) (noting the great scrutiny under which copied claims have historically been placed).

The Office has been firm in its position that patent interferences are not generalized patent cancellation proceedings. The Office has proposed an enhanced post-grant review proceeding to fill the perceived need for such a proceeding. United States Patent and Trademark Office, The 21st Century Strategic Plan at 11 (updated 3 February 2003).

The provision for written description as a threshold issue has been amended to narrow it to provoked interferences since that is where the concern lies. The lack of an express suggestion of an interference under § 41.202(a) will not necessarily shield an applicant from a threshold motion. There will be no examination of an applicant's intent to provoke an interference where the opportunity to have done so is clear. Any other practice would open the practice to abuse and misconduct.

Comment 164: The comment questions whether enablement should also be a threshold issue.

Answer: Since the list of threshold issues is inclusive, it would permit additional issues to be treated as standing issues. Whether enablement is routinely such an issue is left to further development through adjudication. The current impression is that the enablement requirement appears to be less frequently abused, in the absence of a lack of written description, when provoking an interference.

Section 41.202(a)(2) has been modified to clarify that an applicant suggesting an interference must also propose at least one count (as defined in § 41.201) since an explanation of correspondence to the count is required in § 41.202(a)(3).

Section 41.202(a)(3) requires an applicant suggesting an interference to identify the claims that interfere and explain how they correspond to the suggested count. When the suggestion is made on the basis of a published application, the decision to declare an interference will be based on the claims pending in the published application at the time of the decision, which may differ from the published claims. Note that no interference will be declared until both applications have allowable claims that still interfere.

Comment 165: Section 41.202(a)(4) requires an applicant suggesting an interference provide a detailed explanation of why it will prevail on priority, while § 41.202(d) requires an actual showing of priority. One comment suggests that these two sections are inconsistent.

Answer: There is no inconsistency between the rules. Section 41.202(a)(4) is a general requirement that any applicant suggesting an interference provide an explanation of why it will prevail. If the applicant has the earliest effective filing date, the explanation should ordinarily be fairly simple. Section 41.202(d) addresses the case in which the applicant does not have the earlier effective filing date. In such a case, a more thorough showing is required because otherwise on the face of the record no interference is necessary to dispose of the interfering claim.

Comment 166: One comment suggests that § 41.202(a)(6)'s requirement for a chart showing supporting disclosure for an embodiment within the scope of the interfering subject matter is too narrow since it does not address instances where there is disclosure of the entire interfering subject matter, but not of a specific embodiment.

Answer: The rule is modified to refer to a constructive reduction to practice within the scope of the interfering subject matter. Since the definition of constructive reduction to practice in § 41.201 has been clarified to reflect anticipation under 35 U.S.C. 102(g)(1), this change should also address the suggestion in this comment.

Comment 167: Three comments suggest that § 41.202(b), regarding patentees seeking interferences, include a reference to § 1.99. One suggests that

§ 41.202(b) is too restrictive, while two of the comments suggest it might be inconsistent with the more restrictive § 1.99.

Answer: The rule is not intended to create, eliminate, or modify a remedy available under § 1.99 or § 1.291. The rule simply observes that the process for suggesting an interference is not available to a patentee and points to an alternative remedy. Section 41.202(b) is revised to clarify this intent and to point patentees to both § 1.99 and § 1.291.

Comment 168: One comment expresses concern about § 41.202(c), under which an examiner may require an applicant to add an interfering claim. The comment worries that the applicant is placed in an awkward position if an examiner suggests an interfering claim that the applicant believes is improper because it is not supported or because the examiner's reasoning is unclear.

Answer: The applicant's remedy in such a situation is to comply with the requirement, but also to add a better claim or to contest the requirement. See *In re Ogiue,* 517 F.2d 1382, 1390, 186 USPQ 227, 235 (CCPA 1975) (holding that refusal to copy a claim for which the applicant had support results in disclaimer). The requirement that an applicant either comply by adding the proposed claim or concede priority of the proposed subject matter is not new, see 37 CFR 1.605 (2003) and MPEP § 2305. Section 41.202(c) has been further modified to require showings like those under § 41.202(a)(2)–(a)(6) when the interference would be with a patent. Any dispute arising as to satisfaction of these added procedural requirements may be petitioned.

Comment 169: Three comments address the requirement under § 41.202(d) to show priority. Two of the comments suggest restoring some version of the reduced showing required under § 1.608(a) (2003) for an application with an effective filing date within three months of an interfering patent's effective filing date. A third comment suggests that a similar requirement be made of all junior patentees.

Answer: The three-month practice under § 1.608 (2003) was eliminated because it makes little sense in many circumstances. The comments assume that a fairly common practice prevails to spend a few months preparing applications. The argument fails for two reasons.

First, while it may be common generally, it does not appear to be common in all technologies and may be meaningless in the context of a particular case. Second, if we are to assume that the applicant spent three months preparing an application, then we should also be able to make the same assumption about the earlier-filing interfering patent, in which case the assumption does little to address whether the applicant was the first to invent. See *Paulik* v. *Rizkalla,* 760 F.2d 1270, 1282, 226 USPQ 224, 232–33 (Fed. Cir. 1985) (Rich, J., concurring; making a similar point).

Comment 170: One comment suggests distinguishing between complex and simple technologies in § 41.202(d). The comment does not offer a definition of simple or complex technology.

Answer: Such a distinction would be unworkable in practice.

Comment 171: Another comment suggests waiting until the interference is initiated to require the showing under § 41.202(d).

Answer: A practice of waiting would require the declaration of an interference, with all of the costs associated with the declaration of an interference, that the applicant might not want to contest. Moreover, since an inadequate showing under § 41.202(d) is the trigger for a summary disposition under § 41.202(d)(2), delay in making the showing would drag out the pendency of the interference.

Comment 172: One comment suggests requiring a showing under § 41.202(d) from junior patentees as well.

Answer: In an interference, the Office does not have jurisdiction over the patent until after the interference is declared. Once the Board declares an interference, a junior party must make a priority statement under § 41.204(a). Normally, the priority statement is required early in the interference. Nothing in the rules prevents a summary proceeding for a patentee that cannot show an adequate date of priority in its priority statement. Moreover, nothing prevents the Board from expediting consideration of priority in such circumstances.

Section 41.202(e) addresses what evidence is sufficient to show priority. Paragraph (2) has been added to address a situation in which a showing cannot be made because the necessary evidence is not available without a subpoena. In such cases, a detailed proffer of the expected testimony or production may suffice.

Comment 173: Eight comments address § 41.203(a)'s definition for interfering subject matter. Seven oppose the rule, while one seeks clarification.

The seven that oppose would all prefer that the Board use a one-way test for interfering subject matter.

Answer: A one-way test is not workable since it would turn a large portion of rejections under 35 U.S.C. 102(a), 102(e), and 103(a) into interferences simply because the subject matter claimed in the prior art anticipated or rendered obvious the subject matter subsequently claimed.

The one-way practice has never been the standard for interfering subject matter. Although some comments suggest that the two-way test of § 41.203(a) originated with *Winter* v. *Fujita,* 53 USPQ2d 1234 (BPAI 1999), that decision only originated the use of the term "two-way" in the context of interfering subject matter. The two-way test itself has long been implicit in the test for no interference-in-fact: one-way patentable distinctness. *See,* e.g., *Aelony* v. *Arni,* 547 F.2d 566, 570, 192 USPQ 486, 490 (CCPA 1977). It is worth noting that the test for interfering patents under 35 U.S.C. 291 had been framed in, if anything, even narrower terms than the test under § 41.203(a). See e.g., *Slip Track Sys.* v. *Metal Lite, Inc.,* 159 F.3d 1337, 1341, 48 USPQ2d 1055, 1058 (Fed. Cir. 1998) ("patents that claim identical subject matter").

Comment 174: One comment suggests that the paradox of having a one-way test for both starting and ending an interference could be resolved if the test for no interference-in-fact only worked in one direction. That is, the movant must show that its claim is patentably distinct from the opponent's claim rather than showing that the opponent's claim is patentably distinct from the movant's claim. The example given is a genus claim that is anticipated by, but does not anticipate, another party's species claim.

Answer: The problem with this suggestion is that it cedes control over the interference to the party with the species claim, who can decide unilaterally whether to file for no interference-in-fact or not. The suggested directional test also ignores the Director's role under 35 U.S.C. 135(a) in deciding whether an interference exists or not.

Under the directional test, an interference would both exist and not exist. If the Director turns a blind eye to the fact that there is no interference-in-fact from one perspective, the Director has effectively enlisted on the species claimant's side. Such a result would, at a minimum, appear to be unfair.

Comment 175: Six comments urge that a one-way test is necessary so that a senior party applicant may attack a junior party patentee with a dominating claim.

Answer: The problem the comments identify as appropriate for an interference is instead a case of claim dominance. The remedy consequently is not an interference, but may be a

reexamination or some other patentability or validity contest. The Office has proposed a post-grant review process that would provide an appropriate forum for addressing such concerns. United States Patent and Trademark Office, The 21st Century Strategic Plan at 11 (updated 3 February 2003). The Office remains steadfast in its position that an interference is not a post-grant cancellation proceeding.

Comment 176: One comment notes that foreign priority proofs are treated differently under 35 U.S.C. 102(g)(1) and (g)(2). According to the comment, this difference violates treaty obligations by placing the foreign patentee at a disadvantage under 35 U.S.C. 102(g)(2). The comment urges that the Office has the initial responsibility to provide a remedy by extending the jurisdiction for interferences to cover situations that otherwise only fall within 35 U.S.C. 102(g)(2).

Answer: Even assuming the comment is correct, the problem lies in the legislative decision to treat outcomes based on 35 U.S.C. 102(g)(1) and (g)(2) differently. The effect of following the comment's suggestion would be to eliminate a distinction that the statute was only recently amended to create. The only plausible reading of 35 U.S.C. 102(g) is that Congress intended foreign priority proofs to be treated differently depending on the situation in which the issue arises. Consequently, the comment would be more appropriately directed to Congress.

Comment 177: One comment seeks clarification about whether unpatentable claims, particularly claims that are unpatentable as the result of a threshold motion, would be taken into consideration in determining whether there are interfering claims.

Answer: Ordinarily, claims that are unpatentable would not be placed into an interference. See § 41.102; *Brenner* v. *Manson*, 383 U.S. 519, 528 n.12 (1966) (observing that when a claim is unpatentable on its face, a priority contest need not "inexorably take place"). Similarly, if all interfering claims become unpatentable as a result of a threshold motion, judgment in the interference is justified. See *Berman* v. *Housey*, 291 F.3d 1345, 1351, 63 USPQ2d 1023, 1027 (Fed. Cir. 2002) (affirming a judgment against a party with claims barred by 35 U.S.C. 135(b)).

Comment 178: One comment suggests that § 41.203(b) be modified to have the notice of declaration set forth the basis for any claim correspondence or accorded benefit.

Answer: A similar effort was made in former § 1.609 (1998) to have the examiner explain the basis for correspondence. The rule was subsequently withdrawn in the face of public complaints that it was delaying the declaration of interferences without providing much real benefit to the parties. While some explanation is required before a claim can be finally rejected, the declaration simply creates presumptions that are developed through motions. No party is subject to a rejection or cancellation of its claims without having had an opportunity to address the presumptions in the declaration.

Comment 179: Two comments address § 41.203(d) regarding the addition of a patent or application to the interference. One comment questions what happened to substituting applications under § 1.633(d) (2003) and also seeks guidance on when a motion to add a patent or an application would be timely.

Answer: The suggestion to add an application or a patent under § 41.203(d) could be raised any time, but is more likely to be granted if it is raised early in an interference. The intent of the rule is that it work like the decision to declare an interference, hence it only addresses the addition of a patent or application. A substitution of an application could be accomplished by moving to add a second application with an interfering claim and by cancelling the involved claims in the first application contingent on the addition of the second application to the interference.

Comment 180: A second comment notes that § 41.203(d) permits the addition of non-party applications or patents. While the comment approves, it suggests requiring the movant to show that the claims of the added patent or application are patentable.

Answer: The suggestion is not adopted. A proceeding in which the third party is not a participant is not a good place to explore the patentability of the third party's claims.

Comment 181: Five comments address § 41.204(a) regarding priority statements. Four of the comments urge that the rule would require too much information to be provided too early in the proceeding and suggest a return to current practice under §§ 1.621–1.628 (2003). One comment requests clarification about the nature and amount of documentary support required for the priority statement.

Answer: Section 41.204(a) is amended to clarify that any party that will put on a priority case must file a priority statement. It has also been amended to list specific requirements for the priority statement. Section 41.204(a) still requires the party to state the bases on which it believes that it is entitled to relief. Such bases might include an intent to prove derivation or to move to be accorded benefit of an additional constructive reduction to practice.

Comment 182: One comment expresses concern that senior parties must file a priority statement and suggests that parties be bound by their preliminary statements.

Answer: Parties are bound by their preliminary statements (§ 41.120(b)). Senior parties do not have to file a priority statement if they do not intend to put on a priority case.

Comment 183: One comment suggests that § 41.204(b) regarding the statement of the basis for relief for substantive motions is redundant with § 41.121(c)(1). It recommends replacing the notice with a list of motions intended to be filed with the basis for each motion as is required under current practice.

Answer: The rule has been restated in terms of a motions list, although the list will require more detail than is often provided on current lists. The list is not a substitute for a motion, but it must provide sufficient detail to place the Board and the opponent on notice of the precise relief sought. The Board needs adequate notice to facilitate scheduling. Moreover, detailed motions lists can lead to other efficiencies, such as stipulations from the opponent.

Comment 184: One comment opposes § 41.207(a)(1) regarding the presumption of the order of invention for priority. According to the comment, if two parties have identical dates for constructive reduction to practice and neither elects to put on a priority case, then the rule suggests that both would lose, while the comment believes that a patent should issue to both.

Answer: The rule codifies case law that establishes that when both parties have the same date of constructive reduction to practice, neither party is entitled to a presumption of priority. *Van Otteren* v. *Hafner*, 278 F.2d 738, 740, 126 USPQ 151, 152 (CCPA 1960) (question of joint invention); *Lassman* v. *Brossi*, 159 USPQ 182, 184 (Bd. Int. 1967) (in which both parties lost when neither established priority).

Comment 185: One comment opposes the extension under § 41.207(a)(2) of the clear and convincing evidence standard to instances where the junior party applicant first files after the publication of the senior party's application. According to the comment, the use of a higher evidentiary standard is tied to the presumption of patent validity under 35 U.S.C. 282.

Answer: The evidentiary standard for the priority case of an applicant that

filed after the opponent's patent issued is the clear and convincing evidence standard. *Price* v. *Symsek*, 988 F.2d 1187, 1190–91, 26 USPQ2d 1031, 1033 (Fed. Cir. 1993). In *Price*, the court rejected the previously applied beyond a reasonable doubt standard as inconsistent with intervening Supreme Court precedent. The court cited the presumption of validity as the reason for using a higher standard. The *Price* decision did not purport to be instituting the use of a higher standard in such cases; rather, it was following older precedent. 988 F.2d at 1192 n.2, 26 USPQ2d at 1035 n.2. The older precedent provides reason to believe that the presumption of validity is not the only, or even the primary, reason for using a higher evidentiary standard.

The best reason for believing that the presumption of validity is not the primary basis for the higher evidentiary standard is that not all patents in interferences benefit from the higher standard. Indeed, the higher standard is the exception and not the rule. "It is important to bear in mind that merely because one of the parties has an issued patent does not mean that the other party must prove his case by [a higher evidentiary standard]." C.W. Rivise & A.D. Caesar, 3 Interference Law & Practice at section 467 (1947); accord *Bosies* v. *Benedict*, 27 F.3d 539, 541–42, 30 USPQ2d 1862, 1864(Fed. Cir. 1994) (distinguishing *Price*). Moreover, the higher standard does not apply to questions that do not bear directly on priority. 3 Interference Law & Practice at § 471; see also *In re Etter*, 756 F.2d 856, 857, 225 USPQ 1, 4 (Fed. Cir. 1985) (in banc) (clear and convincing evidence standard does not apply to patent claims under reexamination).

While *Price* rejected the older evidentiary standard, it did not reject the reasons the older precedent gave for using a higher standard. 988 F.2d at 1192 n.2 & text, 26 USPQ2d at 1035 n.2 & text. That precedent recognized various reasons for the higher standard. *Walker* v. *Altorfer*, 111 F.2d 164, 167, 45 USPQ 317, 320 (CCPA 1940) (one of the cases *Price* cites in n.2). Among the reasons discussed were concerns about spurring and the degradation of evidence after a long delay, 111 F.2d at 168, 45 USPQ at 320. Both of these factors apply in the case of published applications as well.

Typically applications are published 18 months after their earliest claimed benefit date, 35 U.S.C. 122(b)(1), so most late filers would have to have delayed at least 18 months. As the Court of Customs and Patent Appeals cautioned in *Horwath* v. *Lee*, 564 F.2d 948, 950, 195 USPQ 701, 704 (CCPA 1977) (also cited in *Price* at n.2), an inventor should file promptly because a delay in filing raises the risk that intervening actions by another may deprive the inventor of a property right. See also 35 U.S.C. 102(e) (extending the definition of prior art to include published applications) and 35 U.S.C. 135(b) (extending the bar to include published applications).

Section 41.207(a)(2) is consistent with the patent statutes in treating published applications like patents. Unlike the statutes, however, § 41.207(a)(2) does not create a bar to patentability, but simply extends the existing heightened scrutiny for late filers so that it is triggered by publication of an application as well as issuance of a patent. Use of the clear and convincing evidence standard also furthers the important policy goal of encouraging prompt filing.

Comment 186: One comment opposes § 41.207(b) with regard to claim correspondence. The comment gives the example of a generic claim that corresponds to both a generic count and a specific count in which there is a split award. In such a case, the generic claim would be unpatentable based on its correspondence to the species count, even though the party "won" the generic count. The comment distinguishes *In re Saunders*, 219 F.2d 455, 104 USPQ 394 (CCPA 1955), which was discussed in the notice of proposed rule making, because it was an ex parte appeal. The comment also points to *Ex parte Hardman*, 142 USPQ 329 (BPAI 1964) for the proposition that Saunders does not create a per se rule of unpatentability for generic claims in such cases.

Answer: Although the comment urges that the rule represents a change from current practice, the rule simply formalizes the effect of the estoppel arising out of cases like *In re Deckler*, 977 F.2d 1449, 1452, 24 USPQ2d 1448, 1449 (Fed. Cir. 1992), in which a party could not subsequently seek claims that were patentably indistinct from the subject matter of the count lost in the interference. As earlier discussed, no one "wins" a count because surviving a priority contest for one count does not mean that one is thereby entitled to a claim. *Kyrides*, 159 F.2d at 1022, 73 USPQ at 63.

In *Saunders*, a junior party could not claim a generic invention after losing a species count. Although the case was an ex parte appeal, it arose because Saunders was a junior party who had lost a species count, but not the generic count, making the *Saunders* case directly relevant. The case law has many examples of parties who having lost interferences try, with varying degrees of success to either claim around (*e.g.*, *In re Johnson*, 558 F.2d 1008, 194 USPQ 187 (CCPA 1977)) or to antedate (*e.g.*, *In re Zletz*, 893 F.2d 319, 13 USPQ2d 1320 (Fed. Cir. 1989)) the subject matter of the lost count. *Hardman* was correct that *Saunders* did not create a per se rule of unpatentability for generic claims, but neither does § 41.207(b). It simply creates a presumption that must be addressed.

If a party with a generic claim that corresponds to a species count is concerned about the designation, its remedy is to move to have the generic claim designated as not corresponding to the species count. Often, the motion would be deferred until the priority phase and dismissed unless there were a split award on priority, in which case proof that the generic invention antedates the priority proofs for the lost species count would likely justify relief.

Comment 187: Nine comments oppose at least some aspect of the proposed presumption under § 41.207(d) of abandonment, suppression, or concealment when the party's effective filing date is more than one year after the party's actual reduction to practice.

Answer: The presumption has been deleted as unnecessary. Delays longer than 18 months will often result in a bar to patentability or heightened scrutiny (§ 41.207(a)(2)) anyway so the proposed rule would not have been likely to change the outcome in many interferences.

Under a priority motions practice, abandonment, suppression, or concealment can be raised in the opposition to a priority motion. Any request for additional discovery (§ 41.150(c)) or motion for compelled testimony or production (§ 41.156(a)) should be filed promptly to ensure that it is reflected in the opposition.

Comment 188: One comment suggests adding a provision to § 41.208(a)(2) to address adding counts.

Answer: Section 41.208(a)(2) has been reworded to substitute "definition of the interfering subject matter" for the first occurrence of "count". The point of the rule is to focus parties on using substantive motions to define the range of admissible proofs for priority before the priority phase begins.

Comment 189: Three comments express alarm that priority is addressed as a motion under § 41.208(a)(4). The principal concern appears to be that priority will routinely be decided at the same time as the preliminary motions.

Answer: The rules do not require priority to be decided simultaneously with the preliminary motions. Indeed,

the point of preliminary motions is to simplify the issues for consideration during the priority contest, for instance by better defining the patentable subject matter. Instead, the rules provide for contesting priority in the form of motions. On the other hand, the rules would permit priority to be taken up with, or instead of, preliminary motions in an appropriate case. The Board works out the details of how a given priority case will proceed on a case-by-case basis.

Motions practice is much more efficient than the current briefing practice since each movant must explain the evidence on which it relies rather than simply dumping it on the opposing party and waiting to see what can be made of it. Several interferences have already had priority contests in motions form. Typically, the junior party presents its motion along with its evidence of priority. The motion explains the evidence and gives the senior party an opportunity to see how the junior party is relying on the evidence. Next, the senior party presents its motion if it elects to present a case. Both parties then file oppositions and replies. A motions process eliminates the need for briefing after the evidence is served.

Comment 190: As noted previously, most of § 41.208(c) has not been adopted in the final rule. Like § 1.637 (2003), § 41.208(c) was plagued with problems of over- and under-inclusiveness. See *Hillman*, 55 USPQ2d at 1221. Section 41.208(c) is now limited to requiring a showing of patentability whenever a claim is proposed to be added or amended. Consequently, most of the comments on § 41.208(c) are moot.

Five comments address proposed § 41.208(c)(4)(ii), now part of § 41.208(c)(2), in which a party broadening the count must show the proposed count does not include prior art. Four comments address proposed § 41.208(c)(5)(i), now § 41.208(c)(1), in which a party adding a claim must show the patentability of the claim. One comment urges that the showing be limited to overcoming contrary positions taken during prosecution. The other comments oppose the rule as requiring the movant to prove a negative.

Answer: Section 41.208(c) is now limited to the requirement to show patentability. Any time a claim or count is added or amended, the movant must show that the claim or count does not run afoul of any known patentability problem. The comments are correct that the requirement often obliges the movant to prove a negative, but the alternative is to permit a movant to create a patentability issue without addressing it until the reply brief. While a requirement to prove a negative should generally be avoided, sandbagging an opponent is never acceptable. Moreover, the rule is consistent with the duty of candor to the Office, particularly since the opposing party might not oppose the motion.

Not all showings of patentability require the proof of a negative. For instance, a movant adding a claim must show where the written description for the claim can be found (§ 41.110(c)(2)). Where a negative showing is required, a party may show that it is unaware of a basis for unpatentability. When an applicable patentability question has been raised during prosecution or in an opponent's motion, however, it is not onerous for the movant to address that specific question. This is particularly true for a responsive motion seeking to address an opponent's motion alleging unpatentability. The responsive motion cannot truly be responsive without explaining how it avoids the unpatentability.

For counts, the main concern arises when a count is broadened to include additional subject matter. Since a count defines the scope of proofs admissible to prove priority, it is necessary for the count to be patentable over the prior art. Otherwise, embodiments unpatentable over the prior art could be used to prove priority. As with claims, a party may show that it is unaware of prior art that would anticipate or render obvious the subject matter of the count.

Comment 191: One comment suggests that there be a rule in interferences comparable to § 1.56 and § 1.555 requiring candor toward the Office.

Answer: Such a rule falls outside the scope of this rule making and is, in any case, unnecessary. Litigants and their counsel always have a duty of candor toward a tribunal. This is particularly true when the litigant appears before the tribunal ex parte. American Bar Association, Model Rules of Professional Conduct 3.3(d). Since the Board can independently explore questions of patentability, § 41.121(f), even parties in a contested case stand before the Board in an ex parte capacity. *Cf. SmithKline Beecham Corp.* v. *Apotex Corp.*, 365 F.3d 1306, 1321, 70 USPQ2d 1737, 1748 (Fed. Cir. 2004) (Gajarsa, J., concurring) (patentability can always be raised sua sponte). Moreover, the limited discovery in Board proceedings reduces the check usually available in adversarial proceedings, thus further increasing the duty of candor owed to the Office. Consequently, there is a duty of candor with or without a rule, and the duty is high because of the nature of the proceeding.

The Office has proposed a disciplinary rule that is not as limited in scope as § 1.56 or § 1.555 as a basis for disciplining patent practitioners. 68 FR 69442, 69555, § 11.303(d). Rather than codify the existing duty of candor in yet another narrow context, the Board will rely on its authority to sanction misconduct (§ 41.128(a)) and to regulate counsel (§ 41.5) to address violations of the duty of candor that may arise in a contested case.

Administrative Procedure Act: The notable changes in this final rule are: (1) Consolidating ex parte appeal rules, inter partes reexamination appeal rules, and patent interference rules in a new part 41 of 37 CFR; (2) providing Subpart A of new part 41 to consolidate general provisions relating to the Board of Patent Appeals and Interferences and make them consistent across different proceedings; (3) providing an express delegation from the Director of the United States Patent and Trademark Office to the Chief Administrative Patent Judge to decide petitions arising in Board proceedings; (4) providing a delegation of limited authority to handle disqualifications under 35 U.S.C. 32 from the Director to the Chief Administrative Patent Judge; (5) providing Subpart B of new part 41 setting forth the rules of practice for ex parte appeals; (6) limiting amendments filed on or after the date of filing a brief; (7) changing the format and content of the appeal brief; (8) providing Subpart C of new part 41 setting forth the rules of practice for inter partes reexamination appeals; (9) providing Subpart D of new part 41 setting forth general rules of practice for contested cases, which currently are patent interferences (35 U.S.C. 135) and ownership (42 U.S.C. 2182 and 2457(d)); (10) providing Subpart E of new part 41 setting forth rules of practice specific to patent interferences; (11) clarifying issues regarding when there is an interference-in-fact, how claims correspond to a count, and how benefit of earlier applications is accorded; (12) providing that an applicant adding a claim to provoke an interference with a patent pursuant to a requirement by an examiner must provide additional details about the count, accorded benefit, and claim correspondence for the proposed interference, and (13) clarifying that a two-way unpatentability test is used to determine whether claimed inventions interfere.

The changes in this final rule relate solely to the procedure to be followed in filing and prosecuting a patent application, filing and prosecuting an

appeal to the Board, and contested cases. Therefore, these rule changes involve interpretive rules, or rules of agency practice and procedure under 5 U.S.C. 553(b)(A), and prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). *See Bachow Communications Inc.* v. *FCC*, 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are "rules of agency organization, procedure, or practice" and exempt from the Administrative Procedure Act's notice and comment requirement); *Merck & Co., Inc.* v. *Kessler*, 80 F.3d 1543, 1549–50, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996) (the rules of practice promulgated under the authority of former 35 U.S.C. 6(a) (now in 35 U.S.C. 2(b)(2)) are not substantive rules (to which the notice and comment requirements of the Administrative Procedure Act apply)); *Fressola* v. *Manbeck*, 36 USPQ2d 1211, 1215 (D.D.C. 1995) ("it is doubtful whether any of the rules formulated to govern patent and trade-mark practice are other than 'interpretative rules, general statements of policy, * * * procedure, or practice' " (quoting C.W. Ooms, *The United States Patent Office and the Administrative Procedure Act*, 38 Trademark Rep. 149, 153 (1948).

Regulatory Flexibility Act: As previously discussed, the changes in this final rule involve interpretive rules, or rules of agency practice and procedure, and prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). Because prior notice and an opportunity for public comment were not required for the changes in this final rule, a final Regulatory Flexibility Act analysis is also not required for the changes in this final rule. *See* 5 U.S.C. 603.

Nevertheless, the Office published a notice of proposed rule making in the **Federal Register**, 68 FR 66648 (Nov. 26, 2003), and in the Official Gazette of the United States Patent Office, 1277 OG 139 (Dec. 23, 2003), in order to solicit public participation with regard to this rule package. Pursuant to the notice of proposed rule making, the Deputy General Counsel for General Law of the United States Patent and Trademark Office certified to the Chief Counsel for Advocacy of the Small Business Administration under the provisions of section 605(b) of the Regulatory Flexibility Act that the proposed rule would not have a significant economic impact on a substantial number of small entities. No comments were received which referenced any impact the proposed rules would have on small entities.

The Office receives approximately 350,000 patent applications annually. The final rules contained in this rule package apply to those applications where an appeal brief is filed with the Board and to those applications where an interference is suggested.

Approximately 7,300 appeal briefs are filed in the Office each year. Of this number, small entities file, on average, approximately 1,552 appeal briefs annually. For example, in Fiscal Year 2003, 1,717 small entities filed appeal briefs; in Fiscal Year 2002, 1,442 small entities filed appeal briefs; and in Fiscal Year 2001, 1,497 small entities filed appeal briefs. The average number of small entities affected by these rule changes is a very small percentage of the total number of applications processed by the Office (approximately 0.4%). These final rules do not impact a substantial number of small entities. Moreover, the fees associated with filing an appeal with the Board are set by statute and by previous rule makings, and have not been adjusted in any manner in the current rule making. The procedural rules contained in this rule making package do not increase the cost of filing or processing an appeal before the Board. Thus, these rules have no significant economic impact on small entities.

On average, about 109 interferences are declared in the Office each year. For example, in Fiscal Year 2003, 95 interferences were declared; in Fiscal Year 2002, 109 interferences were declared; and in Fiscal Year 2001, 124 interferences were declared. The Office does not maintain statistics to show the number of small entities that participate in interferences before the Office annually. Each interference involves two parties. Even assuming that every participant in an interference proceeding is a small entity (double the average number of interferences—about 218 per year), the average number of small entities possibly affected by these rule changes is a very small percentage of the total number of applications processed by the Office (approximately 0.0006%). These final rules do not impact a substantial number of small entities. Moreover, the fees associated with filing an interference with the Board are set by statute and by previous rule makings, and have not been adjusted in any manner in the current rule making. The procedural rules contained in this rule making package do not increase the cost of filing or processing an interference before the Board. Thus, these rules have no significant economic impact on small entities.

Accordingly, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes contained in this final rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132: This final rule does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866: This final rule has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act: This final rule involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Currently approved forms include PTO/SB/31 (Notice of appeal) and PTO/SB/32 (Request for hearing), both of which were cleared under the OMB 0651–0031 collection, which will expire at the end of July 2006.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Biologics, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

37 CFR Part 5

Classified information, Exports, Foreign relations, Inventions and patents.

37 CFR Part 10

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

37 CFR Part 11

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

37 CFR Part 41

Administrative practice and procedure, Inventions and patents, Lawyers.

■ For the reasons stated in the preamble, the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office amends 37 CFR chapter I as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

■ 2. Amend § 1.1 to remove paragraph (a)(1)(iii) and to revise paragraph (a)(1)(ii) to read as follows:

§ 1.1 Addresses for non-trademark correspondence with the United States Patent and Trademark Office.

(a) * * *

(1) * * *

(ii) *Board of Patent Appeals and Interferences.* See § 41.10 of this title. Notices of appeal, appeal briefs, reply briefs, requests for oral hearing, as well as all other correspondence in an application or a patent involved in an appeal to the Board for which an address is not otherwise specified, should be addressed as set out in paragraph (a)(1)(i) of this section.

* * * * *

■ 3. In § 1.4, revise paragraph (a)(2) to read as follows:

§ 1.4 Nature of correspondence and signature requirements.

(a) * * *

(2) Correspondence in and relating to a particular application or other proceeding in the Office. See particularly the rules relating to the filing, processing, or other proceedings of national applications in subpart B, §§ 1.31 to 1.378; of international applications in subpart C, §§ 1.401 to 1.499; of ex parte reexaminations of patents in subpart D, §§ 1.501 to 1.570; of extension of patent term in subpart F, §§ 1.710 to 1.785; of inter partes reexaminations of patents in subpart H, §§ 1.902 to 1.997; and of the Board of Patent Appeals and Interferences in part 41 of this title.

* * * * *

§ 1.5 [Amended]

■ 4. Remove and reserve § 1.5(e).

■ 5. Amend § 1.6 by revising paragraph (d)(9) to read as follows:

§ 1.6 Receipt of correspondence.

* * * * *

(d) * * *

(9) In contested cases before the Board of Patent Appeals and Interferences except as the Board may expressly authorize.

* * * * *

■ 6. Amend § 1.8 by removing and reserving paragraph (a)(2)(i)(B) and by revising paragraph (a)(2)(i)(C) to read as follows:

§ 1.8 Certificate of mailing or transmission.

(a) * * *

(2) * * *

(i) * * *

(C) Papers filed in contested cases before the Board of Patent Appeals and Interferences, which are governed by § 41.106(f) of this title;

* * * * *

■ 7. In § 1.9, revise paragraph (g) to read as follows:

§ 1.9 Definitions.

* * * * *

(g) For definitions in Board of Patent Appeals and Interferences proceedings, see part 41 of this title.

* * * * *

■ 8. In § 1.11, revise paragraph (e) to read as follows:

§ 1.11 Files open to the public.

* * * * *

(e) Except as prohibited in § 41.6(b), the file of any interference is open to public inspection and copies of the file may be obtained upon payment of the fee therefor.

* * * * *

■ 9. Amend § 1.14 by revising paragraph (e) to read as follows:

§ 1.14 Patent applications preserved in confidence.

* * * * *

(e) *Decisions by the Director.* Any decision by the Director that would not otherwise be open to public inspection may be published or made available for public inspection if:

(1) The Director believes the decision involves an interpretation of patent laws or regulations that would be of precedential value; and

(2) The applicant is given notice and an opportunity to object in writing within two months on the ground that the decision discloses a trade secret or other confidential information. Any objection must identify the deletions in the text of the decision considered necessary to protect the information, or explain why the entire decision must be withheld from the public to protect such information. An applicant or party will be given time, not less than twenty days, to request reconsideration and seek court review before any portions of a decision are made public under this paragraph over his or her objection.

* * * * *

■ 10. In § 1.17, remove and reserve paragraphs (c) and (d), and revise paragraphs (b) and (h) to read as follows:

§ 1.17 Patent application and reexamination processing fees.

* * * * *

(b) For fees in proceedings before the Board of Patent Appeals and Interferences, see § 41.20 of this title.

* * * * *

(h) For filing a petition under one of the following sections which refers to this paragraph: $130.00.

§ 1.12—for access to an assignment record.

§ 1.14—for access to an application.

§ 1.47—for filing by other than all the inventors or a person not the inventor.

§ 1.53(e)—to accord a filing date.

§ 1.59—for expungement of information.

§ 1.84—for accepting color drawings or photographs.

§ 1.91—for entry of a model or exhibit.

§ 1.102—to make an application special.

§ 1.103(a)—to suspend action in an application.

§ 1.138(c)—to expressly abandon an application to avoid publication.

§ 1.182—for decision on a question not specifically provided for.

§ 1.183—to suspend the rules.

§ 1.295—for review of refusal to publish a statutory invention registration.

§ 1.313—to withdraw an application from issue.

§ 1.314—to defer issuance of a patent.

§ 1.377—for review of decision refusing to accept and record payment of a maintenance fee filed prior to expiration of a patent.

§ 1.378(e)—for reconsideration of decision on petition refusing to accept delayed payment of maintenance fee in an expired patent.

§ 1.741(b)—to accord a filing date to an application under § 1.740 for extension of a patent term.

§ 5.12—for expedited handling of a foreign filing license.

§ 5.15—for changing the scope of a license.

§ 5.25—for retroactive license.

§ 104.3—for waiver of a rule in Part 104 of this title.

* * * * *

■ 11. Revise § 1.36 to read as follows:

§ 1.36 Revocation of power of attorney; withdrawal of patent attorney or agent.

(a) A power of attorney, pursuant to § 1.32(b), may be revoked at any stage in the proceedings of a case by an applicant for patent (§ 1.41(b)) or an assignee of the entire interest of the applicant. A power of attorney to the patent practitioners associated with a Customer Number will be treated as a request to revoke any powers of attorney previously given. Fewer than all of the applicants (or by fewer than the assignee of the entire interest of the applicant) may only revoke the power of attorney upon a showing of sufficient cause, and payment of the petition fee set forth in § 1.17(h). A registered patent attorney or patent agent will be notified of the revocation of the power of attorney. Where power of attorney is given to the patent practitioners associated with a Customer Number (§ 1.32(c)(2)), the practitioners so appointed will also be notified of the revocation of the power of attorney when the power of attorney to all of the practitioners associated with the Customer Number is revoked. The notice of revocation will be mailed to the correspondence address for the application (§ 1.33) in effect before the revocation. An assignment will not of itself operate as a revocation of a power previously given, but the assignee of the entire interest of the applicant may revoke previous powers of attorney and give another power of attorney of the assignee's own selection as provided in § 1.32(b).

(b) A registered patent attorney or patent agent who has been given a power of attorney pursuant to § 1.32(b) may withdraw as attorney or agent of record upon application to and approval by the Director. The applicant or patent owner will be notified of the withdrawal of the registered patent attorney or patent agent. Where power of attorney is given to the patent practitioners associated with a Customer Number, a request to delete all of the patent practitioners associated with the Customer Number may not be granted if an applicant has given power of attorney to the patent practitioners associated with the Customer Number in an application that has an Office action to which a reply is due, but insufficient time remains for the applicant to file a reply. See § 41.5 of this title for withdrawal during proceedings before the Board of Patent Appeals and Interferences.

■ 12. Amend § 1.48 by revising paragraphs (a), (b), (c) and (i), and adding paragraph (j), to read as follows:

§ 1.48 Correction of inventorship in a patent application, other than a reissue application, pursuant to 35 U.S.C. 116.

(a) *Nonprovisional application after oath/declaration filed.* If the inventive entity is set forth in error in an executed § 1.63 oath or declaration in a nonprovisional application, and such error arose without any deceptive intention on the part of the person named as an inventor in error or on the part of the person who through error was not named as an inventor, the inventorship of the nonprovisional application may be amended to name only the actual inventor or inventors. Amendment of the inventorship requires:

(1) A request to correct the inventorship that sets forth the desired inventorship change;

(2) A statement from each person being added as an inventor and from each person being deleted as an inventor that the error in inventorship occurred without deceptive intention on his or her part;

(3) An oath or declaration by the actual inventor or inventors as required by § 1.63 or as permitted by §§ 1.42, 1.43 or § 1.47;

(4) The processing fee set forth in § 1.17(i); and

(5) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b) of this chapter).

(b) *Nonprovisional application—fewer inventors due to amendment or cancellation of claims.* If the correct inventors are named in a nonprovisional application, and the prosecution of the nonprovisional application results in the amendment or cancellation of claims so that fewer than all of the currently named inventors are the actual inventors of the invention being claimed in the nonprovisional application, an amendment must be filed requesting deletion of the name or names of the person or persons who are not inventors of the invention being claimed. Amendment of the inventorship requires:

(1) A request, signed by a party set forth in § 1.33(b), to correct the inventorship that identifies the named inventor or inventors being deleted and acknowledges that the inventor's invention is no longer being claimed in the nonprovisional application; and

(2) The processing fee set forth in § 1.17(i).

(c) *Nonprovisional application—inventors added for claims to previously unclaimed subject matter.* If a nonprovisional application discloses unclaimed subject matter by an inventor or inventors not named in the application, the application may be amended to add claims to the subject matter and name the correct inventors for the application. Amendment of the inventorship requires:

(1) A request to correct the inventorship that sets forth the desired inventorship change;

(2) A statement from each person being added as an inventor that the addition is necessitated by amendment of the claims and that the inventorship error occurred without deceptive intention on his or her part;

(3) An oath or declaration by the actual inventors as required by § 1.63 or as permitted by §§ 1.42, 1.43, or § 1.47;

(4) The processing fee set forth in § 1.17(i); and

(5) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b) of this chapter).

* * * * *

(i) *Correction of inventorship in patent.* See § 1.324 for correction of inventorship in a patent.

(j) *Correction of inventorship in a contested case before the Board of Patent Appeals and Interferences.* In a contested case under part 41, subpart D, of this title, a request for correction of an application must be in the form of a motion under § 41.121(a)(2) of this title and must comply with the requirements of this section.

■ 13. In § 1.55, revise paragraphs (a)(3) and (a)(4) to read as follows:

§ 1.55 Claim for foreign priority.

(a) * * *

(3) The Office may require that the claim for priority and the certified copy of the foreign application be filed earlier than provided in paragraphs (a)(1) or (a)(2) of this section:

(i) When the application becomes involved in an interference (see § 41.202 of this title),

(ii) When necessary to overcome the date of a reference relied upon by the examiner, or

(iii) When deemed necessary by the examiner.

(4)(i) An English language translation of a non-English language foreign application is not required except:

(A) When the application is involved in an interference (see § 41.202 of this title),

(B) When necessary to overcome the date of a reference relied upon by the examiner, or

(C) When specifically required by the examiner.

(ii) If an English language translation is required, it must be filed together

with a statement that the translation of the certified copy is accurate.

* * * * *

■ 14. In § 1.59, revise paragraph (a)(1) to read as follows:

§ 1.59 Expungement of information or copy of papers in application file.

(a)(1) Information in an application will not be expunged, except as provided in paragraph (b) of this section or § 41.7(a) of this title.

* * * * *

■ 15. In § 1.103, revise paragraph (g) to read as follows:

§ 1.103 Suspension of action by the Office.

* * * * *

(g) *Statutory invention registration.* The Office will suspend action by the Office for the entire pendency of an application if the Office has accepted a request to publish a statutory invention registration in the application, except for purposes relating to patent interference proceedings under part 41, subpart D, of this title.

■ 16. Revise § 1.112 to read as follows:

§ 1.112 Reconsideration before final action.

After reply by applicant or patent owner (§ 1.111 or § 1.945) to a non-final action and any comments by an inter partes reexamination requester (§ 1.947), the application or the patent under reexamination will be reconsidered and again examined. The applicant, or in the case of a reexamination proceeding the patent owner and any third party requester, will be notified if claims are rejected, objections or requirements made, or decisions favorable to patentability are made, in the same manner as after the first examination (§ 1.104). Applicant or patent owner may reply to such Office action in the same manner provided in § 1.111 or § 1.945, with or without amendment, unless such Office action indicates that it is made final (§ 1.113) or an appeal (§ 41.31 of this title) has been taken (§ 1.116), or in an inter partes reexamination, that it is an action closing prosecution (§ 1.949) or a right of appeal notice (§ 1.953).

■ 17. In § 1.113, revise paragraph (a) to read as follows:

§ 1.113 Final rejection or action.

(a) On the second or any subsequent examination or consideration by the examiner the rejection or other action may be made final, whereupon applicant's, or for ex parte reexaminations filed under § 1.510, patent owner's reply is limited to appeal in the case of rejection of any claim (§ 41.31 of this title), or to amendment as specified in § 1.114 or § 1.116. Petition may be taken to the Director in the case of objections or requirements not involved in the rejection of any claim (§ 1.181). Reply to a final rejection or action must comply with § 1.114 or paragraph (c) of this section. For final actions in an inter partes reexamination filed under § 1.913, see § 1.953.

* * * * *

■ 18. In § 1.114, revise paragraph (d) to read as follows:

§ 1.114 Request for continued examination.

* * * * *

(d) If an applicant timely files a submission and fee set forth in § 1.17(e), the Office will withdraw the finality of any Office action and the submission will be entered and considered. If an applicant files a request for continued examination under this section after appeal, but prior to a decision on the appeal, it will be treated as a request to withdraw the appeal and to reopen prosecution of the application before the examiner. An appeal brief (§ 41.37 of this title) or a reply brief (§ 41.41 of this title), or related papers, will not be considered a submission under this section.

* * * * *

■ 19. Revise § 1.116 to read as follows:

§ 1.116 Amendments and affidavits or other evidence after final action and prior to appeal.

(a) An amendment after final action must comply with § 1.114 or this section.

(b) After a final rejection or other final action (§ 1.113) in an application or in an ex parte reexamination filed under § 1.510, or an action closing prosecution (§ 1.949) in an inter partes reexamination filed under § 1.913, but before or on the same date of filing an appeal (§ 41.31 or § 41.61 of this title):

(1) An amendment may be made canceling claims or complying with any requirement of form expressly set forth in a previous Office action;

(2) An amendment presenting rejected claims in better form for consideration on appeal may be admitted; or

(3) An amendment touching the merits of the application or patent under reexamination may be admitted upon a showing of good and sufficient reasons why the amendment is necessary and was not earlier presented.

(c) The admission of, or refusal to admit, any amendment after a final rejection, a final action, an action closing prosecution, or any related proceedings will not operate to relieve the application or reexamination proceeding from its condition as subject to appeal or to save the application from abandonment under § 1.135, or the reexamination prosecution from termination under § 1.550(d) or § 1.957(b) or limitation of further prosecution under § 1.957(c).

(d)(1) Notwithstanding the provisions of paragraph (b) of this section, no amendment other than canceling claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, can be made in an inter partes reexamination proceeding after the right of appeal notice under § 1.953 except as provided in § 1.981 or as permitted by § 41.77(b)(1) of this title.

(2) Notwithstanding the provisions of paragraph (b) of this section, an amendment made after a final rejection or other final action (§ 1.113) in an ex parte reexamination filed under § 1.510, or an action closing prosecution (§ 1.949) in an inter partes reexamination filed under § 1.913 may not cancel claims where such cancellation affects the scope of any other pending claim in the reexamination proceeding except as provided in § 1.981 or as permitted by § 41.77(b)(1) of this title.

(e) An affidavit or other evidence submitted after a final rejection or other final action (§ 1.113) in an application or in an ex parte reexamination filed under § 1.510, or an action closing prosecution (§ 1.949) in an inter partes reexamination filed under § 1.913 but before or on the same date of filing an appeal (§ 41.31 or § 41.61 of this title), may be admitted upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented.

(f) Notwithstanding the provisions of paragraph (e) of this section, no affidavit or other evidence can be made in an inter partes reexamination proceeding after the right of appeal notice under § 1.953 except as provided in § 1.981 or as permitted by § 41.77(b)(1) of this title.

(g) After decision on appeal, amendments, affidavits and other evidence can only be made as provided in §§ 1.198 and 1.981, or to carry into effect a recommendation under § 41.50(c) of this title.

■ 20. In § 1.131, revise paragraph (a)(1) to read as follows:

§ 1.131 Affidavit or declaration of prior invention.

(a) * * *

(1) The rejection is based upon a U.S. patent or U.S. patent application publication of a pending or patented application to another or others which claims the same patentable invention as defined in § 41.203(a) of this title, in

which case an applicant may suggest an interference pursuant to § 41.202(a) of this title; or

* * * * *

■ 21. In § 1.136, revise paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 1.136 Extensions of time.

(a)(1) If an applicant is required to reply within a nonstatutory or shortened statutory time period, applicant may extend the time period for reply up to the earlier of the expiration of any maximum period set by statute or five months after the time period set for reply, if a petition for an extension of time and the fee set in § 1.17(a) are filed, unless:

(i) Applicant is notified otherwise in an Office action;

(ii) The reply is a reply brief submitted pursuant to § 41.41 of this title;

(iii) The reply is a request for an oral hearing submitted pursuant to § 41.47(a) of this title;

(iv) The reply is to a decision by the Board of Patent Appeals and Interferences pursuant to § 1.304 or to § 41.50 or § 41.52 of this title; or

(v) The application is involved in a contested case (§ 41.101(a) of this title).

(2) The date on which the petition and the fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The expiration of the time period is determined by the amount of the fee paid. A reply must be filed prior to the expiration of the period of extension to avoid abandonment of the application (§ 1.135), but in no situation may an applicant reply later than the maximum time period set by statute, or be granted an extension of time under paragraph (b) of this section when the provisions of this paragraph are available. See § 1.304 for extensions of time to appeal to the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.550(c) for extensions of time in ex parte reexamination proceedings, § 1.956 for extensions of time in inter partes reexamination proceedings; and §§ 41.4(a) and 41.121(a)(3) of this title for extensions of time in contested cases before the Board of Patent Appeals and Interferences.

* * * * *

(b) When a reply cannot be filed within the time period set for such reply and the provisions of paragraph (a) of this section are not available, the period for reply will be extended only for sufficient cause and for a reasonable time specified. Any request for an extension of time under this paragraph must be filed on or before the day on which such reply is due, but the mere filing of such a request will not affect any extension under this paragraph. In no situation can any extension carry the date on which reply is due beyond the maximum time period set by statute. See § 1.304 for extensions of time to appeal to the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.550(c) for extensions of time in ex parte reexamination proceedings; and § 1.956 for extensions of time in inter partes reexamination proceedings.

* * * * *

■ 22. In § 1.181, revise paragraph (a)(3) to read as follows:

§ 1.181 Petition to the Director.

(a) * * *

(3) To invoke the supervisory authority of the Director in appropriate circumstances. For petitions involving action of the Board of Patent Appeals and Interferences, see § 41.3 of this title.

* * * * *

■ 23. Revise § 1.191 to read as follows:

§ 1.191 Appeal to Board of Patent Appeals and Interferences.

Appeals to the Board of Patent Appeals and Interferences under 35 U.S.C. 134(a) and (b) are conducted according to part 41 of this title.

§§ 1.192, 1.193, 1.194, 1.195, and 1.196 [Removed and reserved].

■ 24. Remove and reserve §§ 1.192 through 1.196.

■ 25. Revise § 1.197 to read as follows:

§ 1.197 Return of jurisdiction from the Board of Patent Appeals and Interferences; termination of proceedings.

(a) *Return of jurisdiction from the Board of Patent Appeals and Interferences.* Jurisdiction over an application or patent under ex parte reexamination proceeding passes to the examiner after a decision by the Board of Patent Appeals and Interferences upon transmittal of the file to the examiner, subject to appellant's right of appeal or other review, for such further action by appellant or by the examiner, as the condition of the application or patent under ex parte reexamination proceeding may require, to carry into effect the decision of the Board of Patent Appeals and Interferences.

(b) *Termination of proceedings.* (1) Proceedings on an application are considered terminated by the dismissal of an appeal or the failure to timely file an appeal to the court or a civil action (§ 1.304) except:

(i) Where claims stand allowed in an application; or

(ii) Where the nature of the decision requires further action by the examiner.

(2) The date of termination of proceedings on an application is the date on which the appeal is dismissed or the date on which the time for appeal to the U.S. Court of Appeals for the Federal Circuit or review by civil action (§ 1.304) expires in the absence of further appeal or review. If an appeal to the U.S. Court of Appeals for the Federal Circuit or a civil action has been filed, proceedings on an application are considered terminated when the appeal or civil action is terminated. A civil action is terminated when the time to appeal the judgment expires. An appeal to the U.S. Court of Appeals for the Federal Circuit, whether from a decision of the Board or a judgment in a civil action, is terminated when the mandate is issued by the Court.

■ 26. Revise § 1.198 to read as follows:

§ 1.198 Reopening after a final decision of the Board of Patent Appeals and Interferences.

When a decision by the Board of Patent Appeals and Interferences on appeal has become final for judicial review, prosecution of the proceeding before the primary examiner will not be reopened or reconsidered by the primary examiner except under the provisions of § 1.114 or § 41.50 of this title without the written authority of the Director, and then only for the consideration of matters not already adjudicated, sufficient cause being shown.

■ 27. In § 1.248, revise paragraph (c) to read as follows:

§ 1.248 Service of papers; manner of service; proof of service in cases other than interferences.

* * * * *

(c) See § 41.105(f) of this title for service of papers in contested cases before the Board of Patent Appeals and Interferences.

■ 28. In § 1.292, revise paragraphs (a) and (c) to read as follows:

§ 1.292 Public use proceedings.

(a) When a petition for the institution of public use proceedings, supported by affidavits or declarations is found, on reference to the examiner, to make a prima facie showing that the invention claimed in an application believed to be on file had been in public use or on sale more than one year before the filing of the application, a hearing may be had before the Director to determine whether a public use proceeding should be instituted. If instituted, the Director may designate an appropriate official to conduct the public use proceeding,

including the setting of times for taking testimony, which shall be taken as provided by part 41, subpart D, of this title. The petitioner will be heard in the proceedings but after decision therein will not be heard further in the prosecution of the application for patent.

* * * * *

(c) A petition for institution of public use proceedings shall not be filed by a party to an interference as to an application involved in the interference. Public use and on sale issues in an interference shall be raised by a motion under § 41.121(a)(1) of this title.

* * * * *

■ 29. In § 1.295, revise paragraph (b) to read as follows:

§ 1.295 Review of decision finally refusing to publish a statutory invention registration.

* * * * *

(b) Any requester who is dissatisfied with a decision finally rejecting claims pursuant to 35 U.S.C. 112 may obtain review of the decision by filing an appeal to the Board of Patent Appeals and Interferences pursuant to § 41.31 of this title. If the decision rejecting claims pursuant to 35 U.S.C. 112 is reversed, the request for a statutory invention registration will be approved and the registration published if all of the other provisions of § 1.293 and this section are met.

* * * * *

■ 30. In § 1.302, revise paragraph (b) to read as follows:

§ 1.302 Notice of appeal.

* * * * *

(b) In interferences, the notice must be served as provided in § 41.106(f) of this title.

* * * * *

■ 31. In § 1.303, revise paragraph (c) to read as follows:

§ 1.303 Civil action under 35 U.S.C. 145, 146, 306.

* * * * *

(c) A notice of election under 35 U.S.C. 141 to have all further proceedings on review conducted as provided in 35 U.S.C. 146 must be filed with the Office of the Solicitor and served as provided in § 41.106(f) of this title.

* * * * *

■ 32. In § 1.304, revise paragraphs (a)(1) and (a)(2) to read as follows:

§ 1.304 Time for appeal or civil action.

(a)(1) The time for filing the notice of appeal to the U.S. Court of Appeals for the Federal Circuit (§ 1.302) or for commencing a civil action (§ 1.303) is two months from the date of the decision of the Board of Patent Appeals and Interferences. If a request for rehearing or reconsideration of the decision is filed within the time period provided under § 41.52(a), § 41.79(a), or § 41.127(d) of this title, the time for filing an appeal or commencing a civil action shall expire two months after action on the request. In contested cases before the Board of Patent Appeals and Interferences, the time for filing a cross-appeal or cross-action expires:

(i) Fourteen days after service of the notice of appeal or the summons and complaint; or

(ii) Two months after the date of decision of the Board of Patent Appeals and Interferences, whichever is later.

(2) The time periods set forth in this section are not subject to the provisions of § 1.136, § 1.550(c), or § 1.956, or of § 41.4 of this title.

* * * * *

■ 33. In § 1.322, revise paragraph (a)(3) to read as follows:

§ 1.322 Certificate of correction of Office mistake.

(a) * * *

(3) If the request relates to a patent involved in an interference, the request must comply with the requirements of this section and be accompanied by a motion under § 41.121(a)(2) or § 41.121(a)(3) of this title.

* * * * *

■ 34. Revise § 1.323 to read as follows:

§ 1.323 Certificate of correction of applicant's mistake.

The Office may issue a certificate of correction under the conditions specified in 35 U.S.C. 255 at the request of the patentee or the patentee's assignee, upon payment of the fee set forth in § 1.20(a). If the request relates to a patent involved in an interference, the request must comply with the requirements of this section and be accompanied by a motion under § 41.121(a)(2) or § 41.121(a)(3) of this title.

■ 35. Amend § 1.324 to revise paragraphs (a) and (c), and to add paragraph (d), to read as follows:

§ 1.324 Correction of inventorship in patent, pursuant to 35 U.S.C. 256.

(a) Whenever through error a person is named in an issued patent as the inventor, or through error an inventor is not named in an issued patent and such error arose without any deceptive intention on his or her part, the Director may, on petition, or on order of a court before which such matter is called in question, issue a certificate naming only the actual inventor or inventors. A petition to correct inventorship of a patent involved in an interference must comply with the requirements of this section and must be accompanied by a motion under § 41.121(a)(2) or § 41.121(a)(3) of this title.

* * * * *

(c) For correction of inventorship in an application, see §§ 1.48 and 1.497.

(d) In a contested case before the Board of Patent Appeals and Interferences under part 41, subpart D, of this title, a request for correction of a patent must be in the form of a motion under § 41.121(a)(2) or § 41.121(a)(3) of this title.

■ 36. In § 1.565, revise paragraph (e) to read as follows:

§ 1.565 Concurrent Office proceedings which include an ex parte reexamination proceeding.

* * * * *

(e) If a patent in the process of ex parte reexamination is or becomes involved in an interference, the Director may suspend the reexamination or the interference. The Director will not consider a request to suspend an interference unless a motion (§ 41.121(a)(3) of this title) to suspend the interference has been presented to, and denied by, an administrative patent judge, and the request is filed within ten (10) days of a decision by an administrative patent judge denying the motion for suspension or such other time as the administrative patent judge may set. For concurrent inter partes reexamination and interference of a patent, see § 1.993.

§§ 1.601 through 1.690 (Subpart E) [Removed]

■ 37. Remove and reserve subpart E of part 1.

■ 38. In § 1.701, revise paragraph (c)(2)(ii) to read as follows:

§ 1.701 Extension of patent term due to examination delay under the Uruguay Round Agreements Act (original applications, other than designs, filed on or after June 8, 1995, and before May 29, 2000).

* * * * *

(c) * * *

(2) * * *

(ii) The number of days, if any, in the period beginning on the date of mailing of an examiner's answer under § 41.39 of this title in the application under secrecy order and ending on the date the secrecy order and any renewal thereof was removed;

* * * * *

■ 39. In § 1.703, revise paragraphs (a)(4), (b)(3)(ii), (b)(4), (d)(2), and (e) to read as follows:

§ 1.703 Period of adjustment of patent term due to examination delay.

(a) * * *

(4) The number of days, if any, in the period beginning on the day after the date that is four months after the date an appeal brief in compliance with § 41.37 of this title was filed and ending on the date of mailing of any of an examiner's answer under § 41.39 of this title, an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first;

* * * * *

(b) * * *

(3) * * *

(ii) The number of days, if any, in the period beginning on the date of mailing of an examiner's answer under § 41.39 of this title in the application under secrecy order and ending on the date the secrecy order was removed;

* * * * *

(4) The number of days, if any, in the period beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31 of this title and ending on the date of the last decision by the Board of Patent Appeals and Interferences or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145, or on the date of mailing of either an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first, if the appeal did not result in a decision by the Board of Patent Appeals and Interferences.

* * * * *

(d) * * *

(2) The number of days, if any, in the period beginning on the date of mailing of an examiner's answer under § 41.39 of this title in the application under secrecy order and ending on the date the secrecy order was removed;

* * * * *

(e) The period of adjustment under § 1.702(e) is the sum of the number of days, if any, in the period beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31 of this title and ending on the date of a final decision in favor of the applicant by the Board of Patent Appeals and Interferences or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145.

* * * * *

■ 40. In § 1.704, revise paragraph (c)(9) to read as follows:

§ 1.704 Reduction of period of adjustment of patent term.

* * * * *

(c) * * *

(9) Submission of an amendment or other paper after a decision by the Board of Patent Appeals and Interferences, other than a decision designated as containing a new ground of rejection under § 41.50(b) of this title or statement under § 41.50(c) of this title, or a decision by a Federal court, less than one month before the mailing of an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151 that requires the mailing of a supplemental Office action or supplemental notice of allowance, in which case the period of adjustment set forth in § 1.703 shall be reduced by the lesser of:

(i) The number of days, if any, beginning on the day after the mailing date of the original Office action or notice of allowance and ending on the mailing date of the supplemental Office action or notice of allowance; or

(ii) Four months;

* * * * *

■ 41. Revise § 1.959 to read as follows:

§ 1.959 Appeal in inter partes reexamination.

Appeals to the Board of Patent Appeals and Interferences under 35 U.S.C. 134(c) are conducted according to part 41 of this title.

§§ 1.961, 1.962, 1.963, 1.965, 1.967, 1.969, 1.971, 1.973, 1.975, and 1.977 [Removed and reserved]

■ 42. Remove and reserve §§ 1.961 through 1.977.

■ 43. Revise § 1.979 to read as follows:

§ 1.979 Return of Jurisdiction from the Board of Patent Appeals and Interferences; termination of proceedings.

(a) Jurisdiction over an *inter partes* reexamination proceeding passes to the examiner after a decision by the Board of Patent Appeals and Interferences upon transmittal of the file to the examiner, subject to each appellant's right of appeal or other review, for such further action as the condition of the *inter partes* reexamination proceeding may require, to carry into effect the decision of the Board of Patent Appeals and Interferences.

(b) Upon judgment in the appeal before the Board of Patent Appeals and Interferences, if no further appeal has been taken (§ 1.983), the *inter partes* reexamination proceeding will be terminated and the Director will issue a certificate under § 1.997 terminating the proceeding. If an appeal to the U.S. Court of Appeals for the Federal Circuit has been filed, that appeal is considered terminated when the mandate is issued by the Court.

■ 44. Revise § 1.981 to read as follows:

§ 1.981 Reopening after a final decision of the Board of Patent Appeals and Interferences.

When a decision by the Board of Patent Appeals and Interferences on appeal has become final for judicial review, prosecution of the *inter partes* reexamination proceeding will not be reopened or reconsidered by the primary examiner except under the provisions of § 41.77 of this title without the written authority of the Director, and then only for the consideration of matters not already adjudicated, sufficient cause being shown.

■ 45. Revise § 1.993 to read as follows:

§ 1.993 Suspension of concurrent interference and inter partes reexamination proceeding.

If a patent in the process of inter partes reexamination is or becomes involved in an interference, the Director may suspend the inter partes reexamination or the interference. The Director will not consider a request to suspend an interference unless a motion under § 41.121(a)(3) of this title to suspend the interference has been presented to, and denied by, an administrative patent judge and the request is filed within ten (10) days of a decision by an administrative patent judge denying the motion for suspension or such other time as the administrative patent judge may set.

PART 5—SECRECY OF CERTAIN INVENTIONS AND LICENSES TO EXPORT AND FILE APPLICATIONS IN FOREIGN COUNTRIES

■ 45a. The authority citation for part 5 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), 41, 181–188, as amended by the Patent Law Foreign Filing Amendments Act of 1988, Pub. L. 100–418, 102 Stat. 1567; the Arms Export Control Act, as amended, 22 U.S.C. 2571 *et seq.*; the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*; the Nuclear Non Proliferation Act of 1978; 22 U.S.C. 3201 *et seq.*; and the delegations in the regulations under these Acts to the Director (15 CFR 370.10(j), 22 CFR 125.04, and 10 CFR 810.7).

■ 46. In § 5.3, revise paragraph (b) to read as follows:

§ 5.3 Prosecution of application under secrecy orders; withholding patent.

* * * * *

(b) An interference will not be declared involving a national application under secrecy order. An applicant whose application is under secrecy order may suggest an interference (§ 41.202(a) of this title), but the Office will not act on the request

while the application remains under a secrecy order.

* * * * *

PART 10—REPRESENTATIVE OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

■ 46a. The authority citation for part 10 continues to read as follows:

Authority: 5 U.S.C. 500, 15 U.S.C. 1123; 35 U.S.C. 2(b)(2), 31, 32, 41.

■ 47. In § 10.23, revise paragraph (c)(7) to read as follows:

§ 10.23 Misconduct.

* * * * *

(c) * * *

(7) Knowingly withholding from the Office information identifying a patent or patent application of another from which one or more claims have been copied. See § 41.202(a)(1) of this title.

* * * * *

PART 11—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

■ 47a. The authority citation for part 11 continues to read as follows:

Authority: 5 U.S.C. 500, 15 U.S.C. 1123; 35 U.S.C. 2(b)(2)(D), 32.

■ 48. In § 11.6, revise paragraph (d) to read as follows:

§ 11.6 Registration of attorneys and agents.

* * * * *

(d) *Board of Patent Appeals and Interferences matters.* For action by a person who is not registered in a proceeding before the Board of Patent Appeals and Interferences, see § 41.5(a) of this title.

■ 49. Add part 41 to subchapter A to read as follows:

Authority: 35 U.S.C. 2(b)(2), 3(a)(2)(A), 21, 23, 32, 41, 134, 135.

PART 41—PRACTICE BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Subpart A—General Provisions

Sec.

Subpart B—Ex Parte Appeals

Subpart C—Inter Partes Appeals

Subpart D—Contested Cases

Subpart E—Patent Interferences

Subpart A—General Provisions

§ 41.1 Policy.

(a) *Scope.* Part 41 governs proceedings before the Board of Patent Appeals and Interferences. Sections 1.1 to 1.36 and 1.181 to 1.183 of this title also apply to practice before the Board, as do other sections of part 1 of this title that are incorporated by reference into part 41.

(b) *Construction.* The provisions of Part 41 shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding before the Board.

(c) *Decorum.* Each party must act with courtesy and decorum in all proceedings before the Board, including interactions with other parties.

§ 41.2 Definitions.

Unless otherwise clear from the context, the following definitions apply to proceedings under this part:

Affidavit means affidavit, declaration under § 1.68 of this title, or statutory declaration under 28 U.S.C. 1746. A transcript of an ex parte deposition may be used as an affidavit in a contested case.

Board means the Board of Patent Appeals and Interferences and includes:

(1) For a final Board action:

(i) In an appeal or contested case, a panel of the Board.

(ii) In a proceeding under § 41.3, the Chief Administrative Patent Judge or another official acting under an express delegation from the Chief Administrative Patent Judge.

(2) For non-final actions, a Board member or employee acting with the authority of the Board.

Board member means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, the Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office, the Commissioner for Patents, the Commissioner for Trademarks, and the administrative patent judges.

Contested case means a Board proceeding other than an appeal under 35 U.S.C. 134 or a petition under § 41.3. An appeal in an inter partes reexamination is not a contested case.

Final means, with regard to a Board action, final for the purposes of judicial review. A decision is final only if:

(1) *In a panel proceeding.* The decision is rendered by a panel,

disposes of all issues with regard to the party seeking judicial review, and does not indicate that further action is required; and

(2) *In other proceedings.* The decision disposes of all issues or the decision states it is final.

Hearing means consideration of the issues of record. *Rehearing* means reconsideration.

Office means United States Patent and Trademark Office.

Panel means at least three Board members acting in a panel proceeding.

Panel proceeding means a proceeding in which final action is reserved by statute to at least three Board members, but includes a non-final portion of such a proceeding whether administered by a panel or not.

Party, in this part, means any entity participating in a Board proceeding, other than officers and employees of the Office, including:

(1) An appellant;

(2) A participant in a contested case;

(3) A petitioner; and

(4) Counsel for any of the above, where context permits.

§ 41.3 Petitions.

(a) *Deciding official.* Petitions must be addressed to the Chief Administrative Patent Judge. A panel or an administrative patent judge may certify a question of policy to the Chief Administrative Patent Judge for decision. The Chief Administrative Patent Judge may delegate authority to decide petitions.

(b) *Scope.* This section covers petitions on matters pending before the Board (§§ 41.35, 41.64, 41.103, and 41.205); otherwise, see §§ 1.181 to 1.183 of this title. The following matters are not subject to petition:

(1) Issues committed by statute to a panel, and

(2) In pending contested cases, procedural issues. See § 41.121(a)(3) and § 41.125(c).

(c) *Petition fee.* The fee set in § 41.20(a) must accompany any petition under this section except no fee is required for a petition under this section seeking supervisory review.

(d) *Effect on proceeding.* The filing of a petition does not stay the time for any other action in a Board proceeding.

(e) *Time for action.* (1) Except as otherwise provided in this part or as the Board may authorize in writing, a party may:

(i) File the petition within 14 calendar days from the date of the action from which the party is requesting relief, and

(ii) File any request for reconsideration of a petition decision within 14 calendar days of the decision on petition or such other time as the Board may set.

(2) A party may not file an opposition or a reply to a petition without Board authorization.

§ 41.4 Timeliness.

(a) *Extensions of time.* Extensions of time will be granted only on a showing of good cause except as otherwise provided by rule.

(b) *Late filings.* (1) A late filing that results in either an application becoming abandoned or a reexamination proceeding becoming terminated under §§ 1.550(d) or 1.957(b) or (c) of this title may be revived as set forth in § 1.137 of this title.

(2) A late filing that does not result in either an application becoming abandoned or a reexamination proceeding becoming terminated under §§ 1.550(d) or 1.957(b) or (c) of this title will be excused upon a showing of excusable neglect or a Board determination that consideration on the merits would be in the interest of justice.

(c) *Scope.* This section governs all proceedings before the Board, but does not apply to filings related to Board proceedings before or after the Board has jurisdiction, such as:

(1) Extensions during prosecution (see § 1.136 of this title),

(2) Filing of a brief or request for oral hearing (see §§ 41.37, 41.41, 41.47, 41.67, 41.68, 41.71 and 41.73), or

(3) Seeking judicial review (see §§ 1.301 to 1.304 of this title).

§ 41.5 Counsel.

While the Board has jurisdiction:

(a) *Appearance pro hac vice.* The Board may authorize a person other than a registered practitioner to appear as counsel in a specific proceeding.

(b) *Disqualification.* (1) The Board may disqualify counsel in a specific proceeding after notice and an opportunity to be heard.

(2) A decision to disqualify is not final for the purposes of judicial review until certified by the Chief Administrative Patent Judge.

(c) *Withdrawal.* Counsel may not withdraw from a proceeding before the Board unless the Board authorizes such withdrawal. See § 10.40 of this title regarding conditions for withdrawal.

(d) *Procedure.* The Board may institute a proceeding under this section on its own or a party in a contested case may request relief under this section.

(e) *Referral to the Director of Enrollment and Discipline.* Possible violations of the disciplinary rules in part 10 of this title may be referred to the Office of Enrollment and Discipline for investigation. See § 10.131 of this title.

§ 41.6 Public availability of Board records.

(a) *Publication.* (1) *Generally.* Any Board action is available for public inspection without a party's permission if rendered in a file open to the public pursuant to § 1.11 of this title or in an application that has been published in accordance with §§ 1.211 to 1.221 of this title. The Office may independently publish any Board action that is available for public inspection.

(2) *Determination of special circumstances.* Any Board action not publishable under paragraph (a)(1) of this section may be published or made available for public inspection if the Director believes that special circumstances warrant publication and a party does not, within two months after being notified of the intention to make the action public, object in writing on the ground that the action discloses the objecting party's trade secret or other confidential information and states with specificity that such information is not otherwise publicly available. If the action discloses such information, the party shall identify the deletions in the text of the action considered necessary to protect the information. If the affected party considers that the entire action must be withheld from the public to protect such information, the party must explain why. The party will be given time, not less than twenty days, to request reconsideration and seek court review before any contested portion of the action is made public over its objection.

(b) *Record of proceeding.* (1) The record of a Board proceeding is available to the public unless a patent application not otherwise available to the public is involved.

(2) Notwithstanding paragraph (b)(1) of this section, after a final Board action in or judgment in a Board proceeding, the record of the Board proceeding will be made available to the public if any involved file is or becomes open to the public under § 1.11 of this title or an involved application is or becomes published under §§ 1.211 to 1.221 of this title.

§ 41.7 Management of the record.

(a) The Board may expunge any paper directed to a Board proceeding, or filed while an application or patent is under the jurisdiction of the Board, that is not authorized under this part or in a Board order, or that is filed contrary to a Board order.

(b) A party may not file a paper previously filed in the same Board proceeding, not even as an exhibit or

appendix, without Board authorization or as required by rule.

§ 41.8 Mandatory notices.

(a) In an appeal brief (§§ 41.37, 41.67, or 41.68) or at the initiation of a contested case (§ 41.101), and within 20 days of any change during the proceeding, a party must identify:

(1) Its real party-in-interest, and

(2) Each judicial or administrative proceeding that could affect, or be affected by, the Board proceeding.

(b) For contested cases, a party seeking judicial review of a Board proceeding must file a notice with the Board of the judicial review within 20 days of the filing of the complaint or the notice of appeal. The notice to the Board must include a copy of the complaint or notice of appeal. See also §§ 1.301 to 1.304 of this title.

§ 41.9 Action by owner.

(a) *Entire interest.* An owner of the entire interest in an application or patent involved in a Board proceeding may act in the proceeding to the exclusion of the inventor (see § 3.73(b) of this title).

(b) *Part interest.* An owner of a part interest in an application or patent involved in a Board proceeding may petition to act in the proceeding to the exclusion of an inventor or a co-owner. The petition must show the inability or refusal of an inventor or co-owner to prosecute the proceeding or other cause why it is in the interest of justice to permit the owner of a part interest to act in the proceeding. An order granting the petition may set conditions on the actions of the parties during the proceeding.

§ 41.10 Correspondence addresses.

Except as the Board may otherwise direct,

(a) *Appeals.* Correspondence in an application or a patent involved in an appeal (subparts B and C of this part) during the period beginning when an appeal docketing notice is issued and ending when a decision has been rendered by the Board, as well as any request for rehearing of a decision by the Board, shall be mailed to: Board of Patent Appeals and Interferences, United States Patent and Trademark Office, PO Box 1450, Alexandria, Virginia 22313–1450. Notices of appeal, appeal briefs, reply briefs, requests for oral hearing, as well as all other correspondence in an application or a patent involved in an appeal to the Board for which an address is not otherwise specified, should be addressed as set out in § 1.1(a)(1)(i) of this title.

(b) *Contested cases.* Mailed correspondence in contested cases (subpart D of this part) shall be sent to Mail Stop INTERFERENCE, Board of Patent Appeals and Interferences, United States Patent and Trademark Office, PO Box 1450, Alexandria, Virginia 22313–1450.

§ 41.11 Ex Parte communications in inter partes proceedings.

An ex parte communication about an inter partes reexamination (subpart C of this part) or about a contested case (subparts D and E of this part) with a Board member, or with a Board employee assigned to the proceeding, is not permitted.

§ 41.12 Citation of authority.

(a) Citations to authority must include:

(1) *For any United States Supreme Court decision,* a United States Reports citation.

(2) *For any decision other than a United States Supreme Court decision,* parallel citation to both the West Reporter System and to the United States Patents Quarterly whenever the case is published in both. Other parallel citations are discouraged.

(3) *Pinpoint citations* whenever a specific holding or portion of an authority is invoked.

(b) Non-binding authority should be used sparingly. If the authority is not an authority of the Office and is not reproduced in one of the reporters listed in paragraph (a) of this section, a copy of the authority should be filed with the first paper in which it is cited.

§ 41.20 Fees.

(a) *Petition fee.* The fee for filing a petition under this part is	$130.00
(b) *Appeal fees.* (1) For filing a notice of appeal from the examiner to the Board:	
By a small entity (§ 1.27(a) of this title)	165.00
By other than a small entity	330.00
(2) In addition to the fee for filing a notice of appeal, for filing a brief in support of an appeal:	
By a small entity (§ 1.27(a) of this title)	165.00
By other than a small entity	330.00
(3) For filing a request for an oral hearing before the Board in an appeal under 35 U.S.C. 134:	
By a small entity (§ 1.27(a) of this title)	145.00
By other than a small entity	290.00

Subpart B—Ex Parte Appeals

§ 41.30 Definitions.

In addition to the definitions in § 41.2, the following definitions apply to proceedings under this subpart unless otherwise clear from the context:

Applicant means either the applicant in a national application for a patent or the applicant in an application for reissue of a patent.

Owner means the owner of the patent undergoing ex parte reexamination under § 1.510 of this title.

Proceeding means either a national application for a patent, an application for reissue of a patent, or an *ex parte* reexamination proceeding. Appeal to the Board in an *inter partes* reexamination proceeding is controlled by subpart C of this part.

§ 41.31 Appeal to Board.

(a) *Who may appeal and how to file an appeal.* (1) Every applicant, any of whose claims has been twice rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(2) Every owner of a patent under *ex parte* reexamination filed under § 1.510 of this title before November 29, 1999, any of whose claims has been twice rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(3) Every owner of a patent under *ex parte* reexamination filed under § 1.510 of this title on or after November 29, 1999, any of whose claims has been finally (§ 1.113 of this title) rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(b) The signature requirement of § 1.33 of this title does not apply to a notice of appeal filed under this section.

(c) An appeal, when taken, must be taken from the rejection of all claims under rejection which the applicant or owner proposes to contest. Questions relating to matters not affecting the merits of the invention may be required to be settled before an appeal can be considered.

(d) The time periods set forth in paragraphs (a)(1) through (a)(3) of this section are extendable under the provisions of § 1.136 of this title for patent applications and § 1.550(c) of this title for ex parte reexamination proceedings.

§ 41.33 Amendments and affidavits or other evidence after appeal.

(a) Amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) and prior to the date a brief is filed pursuant to § 41.37 may be admitted as provided in § 1.116 of this title.

(b) Amendments filed on or after the date of filing a brief pursuant to § 41.37 may be admitted:

(1) To cancel claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, or

(2) To rewrite dependent claims into independent form.

(c) All other amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i), 41.50(b)(1) and 41.50(c).

(d)(1) An affidavit or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) and prior to the date of filing a brief pursuant to § 41.37 may be admitted if the examiner determines that the affidavit or other evidence overcomes all rejections under appeal and that a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented has been made.

(2) All other affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i) and 41.50(b)(1).

§ 41.35 Jurisdiction over appeal.

(a) Jurisdiction over the proceeding passes to the Board upon transmittal of the file, including all briefs and examiner's answers, to the Board.

(b) If, after receipt and review of the proceeding, the Board determines that the file is not complete or is not in compliance with the requirements of this subpart, the Board may relinquish jurisdiction to the examiner or take other appropriate action to permit completion of the file.

(c) Prior to the entry of a decision on the appeal by the Board, the Director may sua sponte order the proceeding remanded to the examiner.

§ 41.37 Appeal brief.

(a)(1) Appellant must file a brief under this section within two months from the date of filing the notice of appeal under § 41.31.

(2) The brief must be accompanied by the fee set forth in § 41.20(b)(2).

(b) On failure to file the brief, accompanied by the requisite fee, within the period specified in paragraph (a) of this section, the appeal will stand dismissed.

(c)(1) The brief shall contain the following items under appropriate headings and in the order indicated in paragraphs (c)(1)(i) through (c)(1)(x) of this section, except that a brief filed by an appellant who is not represented by a registered practitioner need only substantially comply with paragraphs (c)(1)(i) through (c)(1)(iv) and (c)(1)(vii) through (c)(1)(x) of this section:

(i) *Real party in interest.* A statement identifying by name the real party in interest.

(ii) *Related appeals and interferences.* A statement identifying by application, patent, appeal or interference number all other prior and pending appeals, interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. Copies of any decisions rendered by a court or the Board in any proceeding identified under this paragraph must be included in an appendix as required by paragraph (c)(1)(x) of this section.

(iii) *Status of claims.* A statement of the status of all the claims in the proceeding (*e.g.*, rejected, allowed or confirmed, withdrawn, objected to, canceled) and an identification of those claims that are being appealed.

(iv) *Status of amendments.* A statement of the status of any amendment filed subsequent to final rejection.

(v) *Summary of claimed subject matter.* A concise explanation of the subject matter defined in each of the independent claims involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters. For each independent claim involved in the appeal and for each dependent claim argued separately under the provisions of paragraph (c)(1)(vii) of this section, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters.

(vi) *Grounds of rejection to be reviewed on appeal.* A concise statement of each ground of rejection presented for review.

(vii) *Argument.* The contentions of appellant with respect to each ground of rejection presented for review in paragraph (c)(1)(vi) of this section, and the basis therefor, with citations of the statutes, regulations, authorities, and parts of the record relied on. Any arguments or authorities not included in the brief or a reply brief filed pursuant to § 41.41 will be refused consideration by the Board, unless good cause is shown. Each ground of rejection must be treated under a separate heading. For each ground of rejection applying to two or more claims, the claims may be argued separately or as a group. When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone. Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately. Any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number. A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.

(viii) *Claims appendix.* An appendix containing a copy of the claims involved in the appeal.

(ix) *Evidence appendix.* An appendix containing copies of any evidence submitted pursuant to §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the examiner and relied upon by appellant in the appeal, along with a statement setting forth where in the record that evidence was entered in the record by the examiner. Reference to unentered evidence is not permitted in the brief. See § 41.33 for treatment of evidence submitted after

appeal. This appendix may also include copies of the evidence relied upon by the examiner as to grounds of rejection to be reviewed on appeal.

(x) *Related proceedings appendix.* An appendix containing copies of decisions rendered by a court or the Board in any proceeding identified pursuant to paragraph (c)(1)(ii) of this section.

(2) A brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other evidence. See § 1.116 of this title for amendments, affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.33 for amendments, affidavits or other evidence filed after the date of filing the appeal.

(d) If a brief is filed which does not comply with all the requirements of paragraph (c) of this section, appellant will be notified of the reasons for non-compliance and given a time period within which to file an amended brief. If appellant does not file an amended brief within the set time period, or files an amended brief which does not overcome all the reasons for non-compliance stated in the notification, the appeal will stand dismissed.

(e) The time periods set forth in this section are extendable under the provisions of § 1.136 of this title for patent applications and § 1.550(c) of this title for ex parte reexamination proceedings.

§ 41.39 Examiner's answer.

(a)(1) The primary examiner may, within such time as may be directed by the Director, furnish a written answer to the appeal brief including such explanation of the invention claimed and of the references relied upon and grounds of rejection as may be necessary, supplying a copy to appellant. If the primary examiner determines that the appeal does not comply with the provisions of §§ 41.31 and 41.37 or does not relate to an appealable action, the primary examiner shall make such determination of record.

(2) An examiner's answer may include a new ground of rejection.

(b) If an examiner's answer contains a rejection designated as a new ground of rejection, appellant must within two months from the date of the examiner's answer exercise one of the following two options to avoid sua sponte dismissal of the appeal as to the claims subject to the new ground of rejection:

(1) *Reopen prosecution.* Request that prosecution be reopened before the primary examiner by filing a reply under § 1.111 of this title with or without amendment or submission of affidavits (§§ 1.130, 1.131 or 1.132 of this title) or other evidence. Any amendment or submission of affidavits or other evidence must be relevant to the new ground of rejection. A request that complies with this paragraph will be entered and the application or the patent under ex parte reexamination will be reconsidered by the examiner under the provisions of § 1.112 of this title. Any request that prosecution be reopened under this paragraph will be treated as a request to withdraw the appeal.

(2) *Maintain appeal.* Request that the appeal be maintained by filing a reply brief as set forth in § 41.41. Such a reply brief must address each new ground of rejection as set forth in § 41.37(c)(1)(vii) and should follow the other requirements of a brief as set forth in § 41.37(c). A reply brief may not be accompanied by any amendment, affidavit (§§ 1.130, 1.131 or 1.132 of this title) or other evidence. If a reply brief filed pursuant to this section is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under paragraph (b)(1) of this section.

(c) Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

§ 41.41 Reply brief.

(a)(1) Appellant may file a reply brief to an examiner's answer within two months from the date of the examiner's answer.

(2) A reply brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other evidence. See § 1.116 of this title for amendments, affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.33 for amendments, affidavits or other evidence filed after the date of filing the appeal.

(b) A reply brief that is not in compliance with paragraph (a) of this section will not be considered. Appellant will be notified if a reply brief is not in compliance with paragraph (a) of this section.

(c) Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

§ 41.43 Examiner's response to reply brief.

(a)(1) After receipt of a reply brief in compliance with § 41.41, the primary examiner must acknowledge receipt and entry of the reply brief. In addition, the primary examiner may withdraw the final rejection and reopen prosecution or may furnish a supplemental examiner's answer responding to any new issue raised in the reply brief.

(2) A supplemental examiner's answer responding to a reply brief may not include a new ground of rejection.

(b) If a supplemental examiner's answer is furnished by the examiner, appellant may file another reply brief under § 41.41 to any supplemental examiner's answer within two months from the date of the supplemental examiner's answer.

(c) Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

§ 41.47 Oral hearing.

(a) An oral hearing should be requested only in those circumstances in which appellant considers such a hearing necessary or desirable for a proper presentation of the appeal. An appeal decided on the briefs without an oral hearing will receive the same consideration by the Board as appeals decided after an oral hearing.

(b) If appellant desires an oral hearing, appellant must file, as a separate paper captioned "REQUEST FOR ORAL HEARING," a written request for such hearing accompanied by the fee set forth in § 41.20(b)(3) within two months from the date of the examiner's answer or supplemental examiner's answer.

(c) If no request and fee for oral hearing have been timely filed by appellant as required by paragraph (b) of this section, the appeal will be assigned for consideration and decision on the briefs without an oral hearing.

(d) If appellant has complied with all the requirements of paragraph (b) of this section, a date for the oral hearing will be set, and due notice thereof given to appellant. If an oral hearing is held, an oral argument may be presented by, or on behalf of, the primary examiner if considered desirable by either the primary examiner or the Board. A hearing will be held as stated in the notice, and oral argument will ordinarily be limited to twenty minutes for appellant and fifteen minutes for the primary examiner unless otherwise ordered.

(e)(1) Appellant will argue first and may reserve time for rebuttal. At the oral hearing, appellant may only rely on evidence that has been previously entered and considered by the primary examiner and present argument that has been relied upon in the brief or reply brief except as permitted by paragraph (e)(2) of this section. The primary examiner may only rely on argument and evidence relied upon in an answer or a supplemental answer except as permitted by paragraph (e)(2) of this section.

(2) Upon a showing of good cause, appellant and/or the primary examiner may rely on a new argument based upon a recent relevant decision of either the Board or a Federal Court.

(f) Notwithstanding the submission of a request for oral hearing complying with this rule, if the Board decides that a hearing is not necessary, the Board will so notify appellant.

(g) Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time periods set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

§ 41.50 Decisions and other actions by the Board.

(a)(1) The Board, in its decision, may affirm or reverse the decision of the examiner in whole or in part on the grounds and on the claims specified by the examiner. The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed. The Board may also remand an application to the examiner.

(2) If a supplemental examiner's answer is written in response to a remand by the Board for further consideration of a rejection pursuant to paragraph (a)(1) of this section, the appellant must within two months from the date of the supplemental examiner's answer exercise one of the following two options to avoid sua sponte dismissal of the appeal as to the claims subject to the rejection for which the Board has remanded the proceeding:

(i) *Reopen prosecution.* Request that prosecution be reopened before the examiner by filing a reply under § 1.111 of this title with or without amendment or submission of affidavits (§§ 1.130, 1.131 or 1.132 of this title) or other evidence. Any amendment or submission of affidavits or other evidence must be relevant to the issues set forth in the remand or raised in the supplemental examiner's answer. A request that complies with this paragraph will be entered and the application or the patent under ex parte reexamination will be reconsidered by the examiner under the provisions of § 1.112 of this title. Any request that prosecution be reopened under this paragraph will be treated as a request to withdraw the appeal.

(ii) *Maintain appeal.* Request that the appeal be maintained by filing a reply brief as provided in § 41.41. If such a reply brief is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the examiner under paragraph (a)(2)(i) of this section.

(b) Should the Board have knowledge of any grounds not involved in the appeal for rejecting any pending claim, it may include in its opinion a statement to that effect with its reasons for so holding, which statement constitutes a new ground of rejection of the claim. A new ground of rejection pursuant to this paragraph shall not be considered final for judicial review. When the Board makes a new ground of rejection, the appellant, within two months from the date of the decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. The new ground of rejection is binding upon the examiner unless an amendment or new evidence not previously of record is made which, in the opinion of the examiner, overcomes the new ground of rejection stated in the decision. Should the examiner reject the claims, appellant may again appeal to the Board pursuant to this subpart.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

(c) The opinion of the Board may include an explicit statement of how a claim on appeal may be amended to overcome a specific rejection. When the opinion of the Board includes such a statement, appellant has the right to amend in conformity therewith. An amendment in conformity with such statement will overcome the specific rejection. An examiner may reject a claim so-amended, provided that the rejection constitutes a new ground of rejection.

(d) The Board may order appellant to additionally brief any matter that the Board considers to be of assistance in reaching a reasoned decision on the pending appeal. Appellant will be given a non-extendable time period within which to respond to such an order. Failure to timely comply with the order may result in the sua sponte dismissal of the appeal.

(e) Whenever a decision of the Board includes a remand, that decision shall not be considered final for judicial review. When appropriate, upon conclusion of proceedings on remand before the examiner, the Board may enter an order otherwise making its decision final for judicial review.

(f) Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time periods set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

§ 41.52 Rehearing.

(a)(1) Appellant may file a single request for rehearing within two months of the date of the original decision of the Board. No request for rehearing from a decision on rehearing will be permitted, unless the rehearing decision so modified the original decision as to become, in effect, a new decision, and the Board states that a second request for rehearing would be permitted. The request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board. Arguments not raised in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) and (a)(3) of this section. When a request for rehearing is made, the Board shall render a decision on the request for rehearing. The decision on the request for rehearing is deemed to incorporate the earlier opinion reflecting its decision for appeal, except for those portions specifically withdrawn on rehearing, and is final for the purpose of judicial review, except when noted otherwise in the decision on rehearing.

(2) Upon a showing of good cause, appellant may present a new argument based upon a recent relevant decision of either the Board or a Federal Court.

(3) New arguments responding to a new ground of rejection made pursuant to § 41.50(b) are permitted.

(b) Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

§ 41.54 Action following decision.

After decision by the Board, the proceeding will be returned to the examiner, subject to appellant's right of appeal or other review, for such further action by appellant or by the examiner, as the condition of the proceeding may require, to carry into effect the decision.

Subpart C—Inter Partes Appeals

§ 41.60 Definitions.

In addition to the definitions in § 41.2, the following definitions apply to proceedings under this subpart unless otherwise clear from the context:

Appellant means any party, whether the owner or a requester, filing a notice of appeal or cross appeal under § 41.61. If more than one party appeals or cross appeals, each appealing or cross appealing party is an appellant with respect to the claims to which his or her appeal or cross appeal is directed.

Filing means filing with a certificate indicating service of the document under § 1.903 of this title.

Owner means the owner of the patent undergoing *inter partes* reexamination under § 1.915 of this title.

Proceeding means an *inter partes* reexamination proceeding. Appeal to the Board in an *ex parte* reexamination proceeding is controlled by subpart B of this part. An *inter partes* reexamination proceeding is not a contested case subject to subpart D.

Requester means each party, other than the owner, who requested that the patent undergo *inter partes* reexamination under § 1.915 of this title.

Respondent means any requester responding under § 41.68 to the appellant's brief of the owner, or the owner responding under § 41.68 to the appellant's brief of any requester. No requester may be a respondent to the appellant brief of any other requester.

§ 41.61 Notice of appeal and cross appeal to Board.

(a)(1) Upon the issuance of a Right of Appeal Notice under § 1.953 of this title, the owner may appeal to the Board with respect to the final rejection of any claim of the patent by filing a notice of appeal within the time provided in the Right of Appeal Notice and paying the fee set forth in § 41.20(b)(1).

(2) Upon the issuance of a Right of Appeal Notice under § 1.953 of this title, the requester may appeal to the Board with respect to any final decision favorable to the patentability, including any final determination not to make a proposed rejection, of any original, proposed amended, or new claim of the patent by filing a notice of appeal within the time provided in the Right of Appeal Notice and paying the fee set forth in § 41.20(b)(1).

(b)(1) Within fourteen days of service of a requester's notice of appeal under paragraph (a)(2) of this section and upon payment of the fee set forth in § 41.20(b)(1), an owner who has not filed a notice of appeal may file a notice of cross appeal with respect to the final rejection of any claim of the patent.

(2) Within fourteen days of service of an owner's notice of appeal under paragraph (a)(1) of this section and upon payment of the fee set forth in § 41.20(b)(1), a requester who has not filed a notice of appeal may file a notice of cross appeal with respect to any final decision favorable to the patentability, including any final determination not to make a proposed rejection, of any original, proposed amended, or new claim of the patent.

(c) The notice of appeal or cross appeal in the proceeding must identify the appealed claim(s) and must be signed by the owner, the requester, or a duly authorized attorney or agent.

(d) An appeal or cross appeal, when taken, must be taken from all the rejections of the claims in a Right of Appeal Notice which the patent owner proposes to contest or from all the determinations favorable to patentability, including any final determination not to make a proposed rejection, in a Right of Appeal Notice which a requester proposes to contest. Questions relating to matters not affecting the merits of the invention may be required to be settled before an appeal is decided.

(e) The time periods for filing a notice of appeal or cross appeal may not be extended.

(f) If a notice of appeal or cross appeal is timely filed but does not comply with any requirement of this section, appellant will be notified of the reasons for non-compliance and given a non-extendable time period within which to file an amended notice of appeal or cross appeal. If the appellant does not then file an amended notice of appeal or cross appeal within the set time period, or files a notice which does not overcome all the reasons for non-compliance stated in the notification of the reasons for non-compliance, that appellant's appeal or cross appeal will stand dismissed.

§ 41.63 Amendments and affidavits or other evidence after appeal.

(a) Amendments filed after the date of filing an appeal pursuant to § 41.61 canceling claims may be admitted where such cancellation does not affect the scope of any other pending claim in the proceeding.

(b) All other amendments filed after the date of filing an appeal pursuant to § 41.61 will not be admitted except as permitted by § 41.77(b)(1).

(c) Affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.61 will not be admitted except as permitted by reopening prosecution under § 41.77(b)(1).

§ 41.64 Jurisdiction over appeal in inter partes reexamination.

(a) Jurisdiction over the proceeding passes to the Board upon transmittal of the file, including all briefs and examiner's answers, to the Board.

(b) If, after receipt and review of the proceeding, the Board determines that the file is not complete or is not in compliance with the requirements of this subpart, the Board may relinquish jurisdiction to the examiner or take other appropriate action to permit completion of the file.

(c) Prior to the entry of a decision on the appeal by the Board, the Director may sua sponte order the proceeding remanded to the examiner.

§ 41.66 Time for filing briefs.

(a) An appellant's brief must be filed no later than two months from the latest filing date of the last-filed notice of appeal or cross appeal or, if any party to the proceeding is entitled to file an appeal or cross appeal but fails to timely do so, no later than two months from the expiration of the time for filing (by the last party entitled to do so) such notice of appeal or cross appeal. The time for filing an appellant's brief or an amended appellant's brief may not be extended.

(b) Once an appellant's brief has been properly filed, any brief must be filed by respondent within one month from the date of service of the appellant's brief. The time for filing a respondent's brief or an amended respondent's brief may not be extended.

(c) The examiner will consider both the appellant's and respondent's briefs and may prepare an examiner's answer under § 41.69.

(d) Any appellant may file a rebuttal brief under § 41.71 within one month of the date of the examiner's answer. The

time for filing a rebuttal brief or an amended rebuttal brief may not be extended.

(e) No further submission will be considered and any such submission will be treated in accordance with § 1.939 of this title.

§ 41.67 Appellant's brief.

(a)(1) Appellant(s) may once, within time limits for filing set forth in § 41.66, file a brief and serve the brief on all other parties to the proceeding in accordance with § 1.903 of this title.

(2) The brief must be signed by the appellant, or the appellant's duly authorized attorney or agent and must be accompanied by the requisite fee set forth in § 41.20(b)(2).

(b) An appellant's appeal shall stand dismissed upon failure of that appellant to file an appellant's brief, accompanied by the requisite fee, within the time allowed under § 41.66(a).

(c)(1) The appellant's brief shall contain the following items under appropriate headings and in the order indicated in paragraphs (c)(1)(i) through (c)(1)(xi) of this section.

(i) *Real party in interest.* A statement identifying by name the real party in interest.

(ii) *Related appeals and interferences.* A statement identifying by application, patent, appeal or interference number all other prior and pending appeals, interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. Copies of any decisions rendered by a court or the Board in any proceeding identified under this paragraph must be included in an appendix as required by paragraph (c)(1)(xi) of this section.

(iii) *Status of claims.* A statement of the status of all the claims in the proceeding (*e.g.*, rejected, allowed or confirmed, withdrawn, objected to, canceled). If the appellant is the owner, the appellant must also identify the rejected claims whose rejection is being appealed. If the appellant is a requester, the appellant must identify the claims that the examiner has made a determination favorable to patentability, which determination is being appealed.

(iv) *Status of amendments.* A statement of the status of any amendment filed subsequent to the close of prosecution.

(v) *Summary of claimed subject matter.* A concise explanation of the subject matter defined in each of the independent claims involved in the appeal, which shall refer to the specification by column and line number, and to the drawing(s), if any, by reference characters. For each independent claim involved in the appeal and for each dependent claim argued separately under the provisions of paragraph (c)(1)(vii) of this section, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters.

(vi) *Issues to be reviewed on appeal.* A concise statement of each issue presented for review. No new ground of rejection can be proposed by a third party requester appellant, unless such ground was withdrawn by the examiner during the prosecution of the proceeding, and the third party requester has not yet had an opportunity to propose it as a third party requester proposed ground of rejection.

(vii) *Argument.* The contentions of appellant with respect to each issue presented for review in paragraph (c)(1)(vi) of this section, and the basis therefor, with citations of the statutes, regulations, authorities, and parts of the record relied on. Any arguments or authorities not included in the brief permitted under this section or §§ 41.68 and 41.71 will be refused consideration by the Board, unless good cause is shown. Each issue must be treated under a separate heading. If the appellant is the patent owner, for each ground of rejection in the Right of Appeal Notice which appellant contests and which applies to two or more claims, the claims may be argued separately or as a group. When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone. Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately. Any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number. A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.

(viii) *Claims appendix.* An appendix containing a copy of the claims to be reviewed on appeal.

(ix) *Evidence appendix.* An appendix containing copies of any evidence submitted pursuant to §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the examiner and relied upon by appellant in the appeal, along with a statement setting forth where in the record that evidence was entered in the record by the examiner. Reference to unentered evidence is not permitted in the brief. See § 41.63 for treatment of evidence submitted after appeal. This appendix may also include copies of the evidence relied upon by the examiner in any ground of rejection to be reviewed on appeal.

(x) *Related proceedings appendix.* An appendix containing copies of decisions rendered by a court or the Board in any proceeding identified pursuant to paragraph (c)(1)(ii) of this section.

(xi) *Certificate of service.* A certification that a copy of the brief has been served in its entirety on all other parties to the reexamination proceeding. The names and addresses of the parties served must be indicated.

(2) A brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other evidence. See § 1.116 of this title for amendments, affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.63 for amendments, affidavits or other evidence after the date of filing the appeal.

(d) If a brief is filed which does not comply with all the requirements of paragraph (a) and paragraph (c) of this section, appellant will be notified of the reasons for non-compliance and given a non-extendable time period within which to file an amended brief. If appellant does not file an amended brief within the set time period, or files an amended brief which does not overcome all the reasons for non-compliance stated in the notification, that appellant's appeal will stand dismissed.

§ 41.68 Respondent's brief.

(a)(1) Respondent(s) in an appeal may once, within the time limit for filing set forth in § 41.66, file a respondent brief and serve the brief on all parties in accordance with § 1.903 of this title.

(2) The brief must be signed by the party, or the party's duly authorized attorney or agent, and must be accompanied by the requisite fee set forth in § 41.20(b)(2).

(3) The respondent brief shall be limited to issues raised in the appellant

brief to which the respondent brief is directed.

(4) A requester's respondent brief may not address any brief of any other requester.

(b)(1) The respondent brief shall contain the following items under appropriate headings and in the order here indicated, and may include an appendix containing only those portions of the record on which reliance has been made.

(i) *Real Party in Interest.* A statement identifying by name the real party in interest.

(ii) *Related Appeals and Interferences.* A statement identifying by application, patent, appeal or interference number all other prior and pending appeals, interferences or judicial proceedings known to respondent, the respondent's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. Copies of any decisions rendered by a court or the Board in any proceeding identified under this paragraph must be included in an appendix as required by paragraph (b)(1)(ix) of this section.

(iii) *Status of claims.* A statement accepting or disputing appellant's statement of the status of claims. If appellant's statement of the status of claims is disputed, the errors in appellant's statement must be specified with particularity.

(iv) *Status of amendments.* A statement accepting or disputing appellant's statement of the status of amendments. If appellant's statement of the status of amendments is disputed, the errors in appellant's statement must be specified with particularity.

(v) *Summary of claimed subject matter.* A statement accepting or disputing appellant's summary of the subject matter defined in each of the independent claims involved in the appeal. If appellant's summary of the subject matter is disputed, the errors in appellant's summary must be specified.

(vi) *Issues to be reviewed on appeal.* A statement accepting or disputing appellant's statement of the issues presented for review. If appellant's statement of the issues presented for review is disputed, the errors in appellant's statement must be specified. A counter statement of the issues for review may be made. No new ground of rejection can be proposed by a requester respondent.

(vii) *Argument.* A statement accepting or disputing the contentions of appellant with each of the issues presented by the appellant for review. If a contention of the appellant is disputed, the errors in appellant's argument must be specified, stating the basis therefor, with citations of the statutes, regulations, authorities, and parts of the record relied on. Each issue must be treated under a separate heading. An argument may be made with each of the issues stated in the counter statement of the issues, with each counter-stated issue being treated under a separate heading.

(viii) *Evidence appendix.* An appendix containing copies of any evidence submitted pursuant to §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the examiner and relied upon by respondent in the appeal, along with a statement setting forth where in the record that evidence was entered in the record by the examiner. Reference to unentered evidence is not permitted in the respondent's brief. See § 41.63 for treatment of evidence submitted after appeal.

(ix) *Related proceedings appendix.* An appendix containing copies of decisions rendered by a court or the Board in any proceeding identified pursuant to paragraph (b)(1)(ii) of this section.

(x) *Certificate of service.* A certification that a copy of the respondent brief has been served in its entirety on all other parties to the reexamination proceeding. The names and addresses of the parties served must be indicated.

(2) A respondent brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other evidence. See § 1.116 of this title for amendments, affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.63 for amendments, affidavits or other evidence filed after the date of filing the appeal.

(c) If a respondent brief is filed which does not comply with all the requirements of paragraph (a) and paragraph (b) of this section, respondent will be notified of the reasons for non-compliance and given a non-extendable time period within which to file an amended brief. If respondent does not file an amended respondent brief within the set time period, or files an amended respondent brief which does not overcome all the reasons for non-compliance stated in the notification, the respondent brief and any amended respondent brief by that respondent will not be considered.

§ 41.69 Examiner's answer.

(a) The primary examiner may, within such time as directed by the Director, furnish a written answer to the owner's and/or requester's appellant brief or respondent brief including, as may be necessary, such explanation of the invention claimed and of the references relied upon, the grounds of rejection, and the reasons for patentability, including grounds for not adopting any proposed rejection. A copy of the answer shall be supplied to the owner and all requesters. If the primary examiner determines that the appeal does not comply with the provisions of §§ 41.61, 41.66, 41.67 and 41.68 or does not relate to an appealable action, the primary examiner shall make such determination of record.

(b) An examiner's answer may not include a new ground of rejection.

(c) An examiner's answer may not include a new determination not to make a proposed rejection of a claim.

(d) Any new ground of rejection, or any new determination not to make a proposed rejection, must be made in an Office action reopening prosecution.

§ 41.71 Rebuttal brief.

(a) Within one month of the examiner's answer, any appellant may once file a rebuttal brief.

(b)(1) The rebuttal brief of the owner may be directed to the examiner's answer and/or any respondent brief.

(2) The rebuttal brief of the owner shall not include any new or non-admitted amendment, or an affidavit or other evidence. See § 1.116 of this title for amendments, affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.63 for amendments, affidavits or other evidence filed after the date of filing the appeal.

(c)(1) The rebuttal brief of any requester may be directed to the examiner's answer and/or the respondent brief of the owner.

(2) The rebuttal brief of a requester may not be directed to the respondent brief of any other requester.

(3) No new ground of rejection can be proposed by a requester.

(4) The rebuttal brief of a requester shall not include any new or non-admitted affidavit or other evidence. See § 1.116(d) of this title for affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.63(c) for affidavits or other evidence filed after the date of filing the appeal.

(d) The rebuttal brief must include a certification that a copy of the rebuttal brief has been served in its entirety on all other parties to the proceeding. The

names and addresses of the parties served must be indicated.

(e) If a rebuttal brief is timely filed under paragraph (a) of this section but does not comply with all the requirements of paragraphs (a) through (d) of this section, appellant will be notified of the reasons for non-compliance and provided with a non-extendable period of one month within which to file an amended rebuttal brief. If the appellant does not file an amended rebuttal brief during the one-month period, or files an amended rebuttal brief which does not overcome all the reasons for non-compliance stated in the notification, that appellant's rebuttal brief and any amended rebuttal brief by that appellant will not be considered.

§ 41.73 Oral hearing.

(a) An oral hearing should be requested only in those circumstances in which an appellant or a respondent considers such a hearing necessary or desirable for a proper presentation of the appeal. An appeal decided on the briefs without an oral hearing will receive the same consideration by the Board as an appeal decided after an oral hearing.

(b) If an appellant or a respondent desires an oral hearing, he or she must file, as a separate paper captioned "REQUEST FOR ORAL HEARING," a written request for such hearing accompanied by the fee set forth in § 41.20(b)(3) within two months after the date of the examiner's answer. The time for requesting an oral hearing may not be extended. The request must include a certification that a copy of the request has been served in its entirety on all other parties to the proceeding. The names and addresses of the parties served must be indicated.

(c) If no request and fee for oral hearing have been timely filed by appellant or respondent as required by paragraph (b) of this section, the appeal will be assigned for consideration and decision on the briefs without an oral hearing.

(d) If appellant or respondent has complied with all the requirements of paragraph (b) of this section, a hearing date will be set, and notice given to the owner and all requesters. If an oral hearing is held, an oral argument may be presented by, or on behalf of, the primary examiner if considered desirable by either the primary examiner or the Board. The notice shall set a non-extendable period within which all requests for oral hearing shall be submitted by any other party to the appeal desiring to participate in the oral hearing. A hearing will be held as stated in the notice, and oral argument will be limited to thirty minutes for each appellant or respondent who has requested an oral hearing, and twenty minutes for the primary examiner unless otherwise ordered. No appellant or respondent will be permitted to participate in an oral hearing unless he or she has requested an oral hearing and submitted the fee set forth in § 41.20(b)(3).

(e)(1) At the oral hearing, each appellant and respondent may only rely on evidence that has been previously entered and considered by the primary examiner and present argument that has been relied upon in the briefs except as permitted by paragraph (e)(2) of this section. The primary examiner may only rely on argument and evidence relied upon in an answer except as permitted by paragraph (e)(2) of this section. The Board will determine the order of the arguments presented at the oral hearing.

(2) Upon a showing of good cause, appellant, respondent and/or the primary examiner may rely on a new argument based upon a recent relevant decision of either the Board or a Federal Court.

(f) Notwithstanding the submission of a request for oral hearing complying with this rule, if the Board decides that a hearing is not necessary, the Board will so notify the owner and all requesters.

§ 41.77 Decisions and other actions by the Board.

(a) The Board of Patent Appeals and Interferences, in its decision, may affirm or reverse each decision of the examiner on all issues raised on each appealed claim, or remand the reexamination proceeding to the examiner for further consideration. The reversal of the examiner's determination not to make a rejection proposed by the third party requester constitutes a decision adverse to the patentability of the claims which are subject to that proposed rejection which will be set forth in the decision of the Board of Patent Appeals and Interferences as a new ground of rejection under paragraph (b) of this section. The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed.

(b) Should the Board reverse the examiner's determination not to make a rejection proposed by a requester, the Board shall set forth in the opinion in support of its decision a new ground of rejection; or should the Board have knowledge of any grounds not raised in the appeal for rejecting any pending claim, it may include in its opinion a statement to that effect with its reasons for so holding, which statement shall constitute a new ground of rejection of the claim. Any decision which includes a new ground of rejection pursuant to this paragraph shall not be considered final for judicial review. When the Board makes a new ground of rejection, the owner, within one month from the date of the decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal proceeding as to the rejected claim:

(1) *Reopen prosecution.* The owner may file a response requesting reopening of prosecution before the examiner. Such a response must be either an amendment of the claims so rejected or new evidence relating to the claims so rejected, or both.

(2) *Request rehearing.* The owner may request that the proceeding be reheard under § 41.79 by the Board upon the same record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

(c) Where the owner has filed a response requesting reopening of prosecution under paragraph (b)(1) of this section, any requester, within one month of the date of service of the owner's response, may once file comments on the response. Such written comments must be limited to the issues raised by the Board's opinion reflecting its decision and the owner's response. Any requester that had not previously filed an appeal or cross appeal and is seeking under this subsection to file comments or a reply to the comments is subject to the appeal and brief fees under § 41.20(b)(1) and (2), respectively, which must accompany the comments or reply.

(d) Following any response by the owner under paragraph (b)(1) of this section and any written comments from a requester under paragraph (c) of this section, the proceeding will be remanded to the examiner. The statement of the Board shall be binding upon the examiner unless an amendment or new evidence not previously of record is made which, in the opinion of the examiner, overcomes the new ground of rejection stated in the decision. The examiner will consider any owner response under paragraph (b)(1) of this section and any written comments by a requester under paragraph (c) of this section and issue

a determination that the rejection is maintained or has been overcome.

(e) Within one month of the examiner's determination pursuant to paragraph (d) of this section, the owner or any requester may once submit comments in response to the examiner's determination. Within one month of the date of service of comments in response to the examiner's determination, the owner and any requesters may file a reply to the comments. No requester reply may address the comments of any other requester reply. Any requester that had not previously filed an appeal or cross appeal and is seeking under this subsection to file comments or a reply to the comments is subject to the appeal and brief fees under § 41.20(b)(1) and (2), respectively, which must accompany the comments or reply.

(f) After submission of any comments and any reply pursuant to paragraph (e) of this section, or after time has expired, the proceeding will be returned to the Board which shall reconsider the matter and issue a new decision. The new decision is deemed to incorporate the earlier decision, except for those portions specifically withdrawn.

(g) The time period set forth in paragraph (b) of this section is subject to the extension of time provisions of § 1.956 of this title when the owner is responding under paragraph (b)(1) of this section. The time period set forth in paragraph (b) of this section may not be extended when the owner is responding under paragraph (b)(2) of this section. The time periods set forth in paragraphs (c) and (e) of this section may not be extended.

§ 41.79 Rehearing.

(a) Parties to the appeal may file a request for rehearing of the decision within one month of the date of:

(1) The original decision of the Board under § 41.77(a),

(2) The original § 41.77(b) decision under the provisions of § 41.77(b)(2),

(3) The expiration of the time for the owner to take action under § 41.77(b)(2), or

(4) The new decision of the Board under § 41.77(f).

(b)(1) The request for rehearing must state with particularity the points believed to have been misapprehended or overlooked in rendering the Board's opinion reflecting its decision. Arguments not raised in the briefs before the Board and evidence not previously relied upon in the briefs are not permitted in the request for rehearing except as permitted by paragraphs (b)(2) and (b)(3) of this section.

(2) Upon a showing of good cause, appellant and/or respondent may present a new argument based upon a recent relevant decision of either the Board or a Federal Court.

(3) New arguments responding to a new ground of rejection made pursuant to § 41.77(b) are permitted.

(c) Within one month of the date of service of any request for rehearing under paragraph (a) of this section, or any further request for rehearing under paragraph (d) of this section, the owner and all requesters may once file comments in opposition to the request for rehearing or the further request for rehearing. The comments in opposition must be limited to the issues raised in the request for rehearing or the further request for rehearing.

(d) If a party to an appeal files a request for rehearing under paragraph (a) of this section, or a further request for rehearing under this section, the Board shall render a decision on the request for rehearing. The decision on the request for rehearing is deemed to incorporate the earlier opinion reflecting its decision for appeal, except for those portions specifically withdrawn on rehearing and is final for the purpose of judicial review, except when noted otherwise in the decision on rehearing. If the Board opinion reflecting its decision on rehearing becomes, in effect, a new decision, and the Board so indicates, then any party to the appeal may, within one month of the new decision, file a further request for rehearing of the new decision under this subsection. Such further request for rehearing must comply with paragraph (b) of this section.

(e) The times for requesting rehearing under paragraph (a) of this section, for requesting further rehearing under paragraph (c) of this section, and for submitting comments under paragraph (b) of this section may not be extended.

§ 41.81 Action following decision.

The parties to an appeal to the Board may not appeal to the U.S. Court of Appeals for the Federal Circuit under § 1.983 of this title until all parties' rights to request rehearing have been exhausted, at which time the decision of the Board is final and appealable by any party to the appeal to the Board.

Subpart D—Contested Cases

§ 41.100 Definitions.

In addition to the definitions in § 41.2, the following definitions apply to proceedings under this subpart:

Business day means a day other than a Saturday, Sunday, or Federal holiday within the District of Columbia.

Involved means the Board has declared the patent application, patent, or claim so described to be a subject of the contested case.

§ 41.101 Notice of proceeding.

(a) Notice of a contested case will be sent to every party to the proceeding. The entry of the notice initiates the proceeding.

(b) When the Board is unable to provide actual notice of a contested case on a party through the correspondence address of record for the party, the Board may authorize other modes of notice, including:

(1) Sending notice to another address associated with the party, or

(2) Publishing the notice in the Official Gazette of the United States Patent and Trademark Office.

§ 41.102 Completion of examination.

Before a contested case is initiated, except as the Board may otherwise authorize, for each involved application and patent:

(a) Examination or reexamination must be completed, and

(b) There must be at least one claim that:

(1) Is patentable but for a judgment in the contested case, and

(2) Would be involved in the contested case.

§ 41.103 Jurisdiction over involved files.

The Board acquires jurisdiction over any involved file when the Board initiates a contested case. Other proceedings for the involved file within the Office are suspended except as the Board may order.

§ 41.104 Conduct of contested case.

(a) The Board may determine a proper course of conduct in a proceeding for any situation not specifically covered by this part and may enter non-final orders to administer the proceeding.

(b) An administrative patent judge may waive or suspend in a proceeding the application of any rule in this subpart, subject to such conditions as the administrative patent judge may impose.

(c) Times set in this subpart are defaults. In the event of a conflict between a time set by rule and a time set by order, the time set by order is controlling. Action due on a day other than a business day may be completed on the next business day unless the Board expressly states otherwise.

§ 41.106 Filing and service.

(a) *General format requirements.* (1) The paper used for filings must be durable and white. A party must choose to file on either A4-sized paper or 8½

inch × 11 inch paper except in the case of exhibits that require a larger size in order to preserve details of the original. A party may not switch between paper sizes in a single proceeding. Only one side of the paper may be used.

(2) In papers, including affidavits, created for the proceeding:

(i) Markings must be in black ink or must otherwise provide an equivalently permanent, dark, high-contrast image on the paper. The quality of printing must be equivalent to the quality produced by a laser printer. Either a proportional or monospaced font may be used, but the proportional font must be 12-point or larger and a monospaced font must not contain more than 4 characters per centimeter (10 characters per inch). Case names must be underlined or italicized.

(ii) Double spacing must be used except in headings, tables of contents, tables of authorities, indices, signature blocks, and certificates of service. Block quotations may be single-spaced and must be indented. Margins must be at least 2.5 centimeters (1 inch) on all sides.

(b) *Papers other than exhibits*—(1) *Cover sheet.* (i) The cover sheet must include the caption the Board specifies for the proceeding, a header indicating the party and contact information for the party, and a title indicating the sequence and subject of the paper. For example, "JONES MOTION 2, For benefit of an earlier application".

(ii) If the Board specifies a color other than white for the cover sheet, the cover sheet must be that color.

(2) Papers must have two 0.5 cm (¼ inch) holes with centers 1 cm (½inch) from the top of the page and 7 cm (2 ¾ inch) apart, centered horizontally on the page.

(3) *Incorporation by reference; combined papers.* Arguments must not be incorporated by reference from one paper into another paper. Combined motions, oppositions, replies, or other combined papers are not permitted.

(4) *Exhibits.* Additional requirements for exhibits appear in § 41.154(c).

(c) *Working copy.* Every paper filed must be accompanied by a working copy marked "APJ Copy".

(d) *Specific filing forms.* (1) *Filing by mail.* A paper filed using the EXPRESS MAIL® service of the United States Postal Service will be deemed to be filed as of "date-in" on the EXPRESS MAIL® mailing label; otherwise, mail will be deemed to be filed as of the stamped date of receipt at the Board.

(2) *Other modes of filing.* The Board may authorize other modes of filing, including electronic filing and hand filing, and may set conditions for the use of such other modes.

(e) *Service.* (1) Papers filed with the Board, if not previously served, must be served simultaneously on every opposing party except as the Board expressly directs.

(2) If a party is represented by counsel, service must be on counsel.

(3) Service must be by EXPRESS MAIL ® or by means at least as fast and reliable as EXPRESS MAIL ®. Electronic service is not permitted without Board authorization.

(4) The date of service does not count in computing the time for responding.

(f) *Certificate of service.* (1) Papers other than exhibits must include a certificate of service as a separate page at the end of each paper that must be served on an opposing party.

(2) Exhibits must be accompanied by a certificate of service, but a single certificate may accompany any group of exhibits submitted together.

(3) A certificate of service must state:

(i) The date and manner of service,

(ii) The name and address of every person served, and

(iii) For exhibits filed as a group, the name and number of each exhibit served.

(4) A certificate made by a person other than a registered patent practitioner must be in the form of an affidavit.

§ 41.108 Lead counsel.

(a) A party may be represented by counsel. The Board may require a party to appoint a lead counsel. If counsel is not of record in a party's involved application or patent, then a power of attorney for that counsel for the party's involved application or patent must be filed with the notice required in paragraph (b) of this section.

(b) Within 14 days of the initiation of each contested case, each party must file a separate notice identifying its counsel, if any, and providing contact information for each counsel identified or, if the party has no counsel, then for the party. Contact information must, at a minimum, include:

(1) A mailing address;

(2) An address for courier delivery when the mailing address is not available for such delivery (for example, when the mailing address is a Post Office box);

(3) A telephone number;

(4) A facsimile number; and

(5) An electronic mail address.

(c) A party must promptly notify the Board of any change in the contact information required in paragraph (b) of this section.

§ 41.109 Access to and copies of Office records.

(a) *Request for access or copies.* Any request from a party for access to or copies of Office records directly related to a contested case must be filed with the Board. The request must precisely identify the records and in the case of copies include the appropriate fee set under § 1.19(b) of this title.

(b) *Authorization of access and copies.* Access and copies will ordinarily only be authorized for the following records:

(1) The application file for an involved patent;

(2) An involved application; and

(3) An application for which a party has been accorded benefit under subpart E of this part.

(c) *Missing or incomplete copies.* If a party does not receive a complete copy of a record within 21 days of the authorization, the party must promptly notify the Board.

§ 41.110 Filing claim information.

(a) *Clean copy of claims.* Within 14 days of the initiation of the proceeding, each party must file a clean copy of its involved claims and, if a biotechnology material sequence is a limitation, a clean copy of the sequence.

(b) *Annotated copy of claims.* Within 28 days of the initiation of the proceeding, each party must:

(1) For each involved claim having a limitation that is illustrated in a drawing or biotechnology material sequence, file an annotated copy of the claim indicating in bold face between braces ({}) where each limitation is shown in the drawing or sequence.

(2) For each involved claim that contains a means-plus-function or step-plus-function limitation in the form permitted under 35 U.S.C. 112(6), file an annotated copy of the claim indicating in bold face between braces ({}) the specific portions of the specification that describe the structure, material, or acts corresponding to each claimed function.

(c) Any motion to add or amend a claim must include:

(1) A clean copy of the claim,

(2) A claim chart showing where the disclosure of the patent or application provides written description of the subject matter of the claim, and

(3) Where applicable, a copy of the claims annotated according to paragraph (b) of this section.

§ 41.120 Notice of basis for relief.

(a) The Board may require a party to provide a notice stating the relief it requests and the basis for its entitlement to relief. The Board may provide for the

notice to be maintained in confidence for a limited time.

(b) *Effect.* If a notice under paragraph (a) of this section is required, a party will be limited to filing substantive motions consistent with the notice. Ambiguities in the notice will be construed against the party. A notice is not evidence except as an admission by a party-opponent.

(c) *Correction.* A party may move to correct its notice. The motion should be filed promptly after the party becomes aware of the basis for the correction. A correction filed after the time set for filing notices will only be entered if entry would serve the interests of justice.

§ 41.121 Motions.

(a) *Types of motions*—(1) *Substantive motions.* Consistent with the notice of requested relief, if any, and to the extent the Board authorizes, a party may file a motion:

(i) To redefine the scope of the contested case,

(ii) To change benefit accorded for the contested subject matter, or

(iii) For judgment in the contested case.

(2) *Responsive motions.* The Board may authorize a party to file a motion to amend or add a claim, to change inventorship, or otherwise to cure a defect raised in a notice of requested relief or in a substantive motion.

(3) *Miscellaneous motions.* Any request for relief other than a substantive or responsive motion must be filed as a miscellaneous motion.

(b) *Burden of proof.* The party filing the motion has the burden of proof to establish that it is entitled to the requested relief.

(c) *Content of motions; oppositions and replies.* (1) Each motion must be filed as a separate paper and must include:

(i) A statement of the precise relief requested,

(ii) A statement of material facts (see paragraph (d) of this section), and

(iii) A full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence and the governing law, rules, and precedent.

(2) *Compliance with rules.* Where a rule in part 1 of this title ordinarily governs the relief sought, the motion must make any showings required under that rule in addition to any showings required in this part.

(3) The Board may order additional showings or explanations as a condition for filing a motion.

(d) *Statement of material facts.* (1) Each material fact shall be set forth as a separate numbered sentence with specific citations to the portions of the record that support the fact.

(2) The Board may require that the statement of material facts be submitted as a separate paper.

(e) *Claim charts.* Claim charts must be used in support of any paper requiring the comparison of a claim to something else, such as another claim, prior art, or a specification. Claim charts must accompany the paper as an appendix. Claim charts are not a substitute for appropriate argument and explanation in the paper.

(f) The Board may order briefing on any issue that could be raised by motion.

§ 41.122 Oppositions and replies.

(a) Oppositions and replies must comply with the content requirements for motions and must include a statement identifying material facts in dispute. Any material fact not specifically denied shall be considered admitted.

(b) All arguments for the relief requested in a motion must be made in the motion. A reply may only respond to arguments raised in the corresponding opposition.

§ 41.123 Default filing times.

(a) A *motion,* other than a miscellaneous motion, may only be filed according to a schedule the Board sets. The default times for acting are:

(1) An *opposition* is due 30 days after service of the motion.

(2) A *reply* is due 30 days after service of the opposition.

(3) A *responsive motion* is due 30 days after the service of the motion.

(b) *Miscellaneous motions.* (1) If no time for filing a specific miscellaneous motion is provided in this part or in a Board order:

(i) The opposing party must be consulted prior to filing the miscellaneous motion, and

(ii) If an opposing party plans to oppose the miscellaneous motion, the movant may not file the motion without Board authorization. Such authorization should ordinarily be obtained through a telephone conference including the Board and every other party to the proceeding. Delay in seeking relief may justify a denial of the motion.

(2) An opposition may not be filed without authorization. The default times for acting are:

(i) An *opposition* to a miscellaneous motion is due five business days after service of the motion.

(ii) A *reply* to a miscellaneous motion opposition is due three business days after service of the opposition.

(c) *Exhibits.* Each exhibit must be filed and served with the first paper in which it is cited except as the Board may otherwise order.

§ 41.124 Oral argument.

(a) *Request for oral argument.* A party may request an oral argument on an issue raised in a paper within five business days of the filing of the paper. The request must be filed as a separate paper and must specify the issues to be considered.

(b) *Copies for panel.* If an oral argument is set for a panel, the movant on any issue to be argued must provide three working copies of the motion, the opposition, and the reply. Each party is responsible for providing three working copies of its exhibits relating to the motion.

(c) *Length of argument.* If a request for oral argument is granted, each party will have a total of 20 minutes to present its arguments, including any time for rebuttal.

(d) *Demonstrative exhibits* must be served at least five business days before the oral argument and filed no later than the time of the oral argument.

(e) *Transcription.* The Board encourages the use of a transcription service at oral arguments but, if such a service is to be used, the Board must be notified in advance to ensure adequate facilities are available and a transcript must be filed with the Board promptly after the oral argument.

§ 41.125 Decision on motions.

(a) *Order of consideration.* The Board may take up motions for decisions in any order, may grant, deny, or dismiss any motion, and may take such other action appropriate to secure the just, speedy, and inexpensive determination of the proceeding. A decision on a motion may include deferral of action on an issue until a later point in the proceeding.

(b) *Interlocutory decisions.* A decision on motions without a judgment is not final for the purposes of judicial review. A panel decision on an issue will govern further proceedings in the contested case.

(c) *Rehearing*—(1) *Time for request.* A request for rehearing of a decision on a motion must be filed within fourteen days of the decision.

(2) *No tolling.* The filing of a request for rehearing does not toll times for taking action.

(3) *Burden on rehearing.* The burden of showing a decision should be modified lies with the party attacking the decision. The request must specifically identify:

(i) All matters the party believes to have been misapprehended or overlooked, and

(ii) The place where the matter was previously addressed in a motion, opposition, or reply.

(4) *Opposition; reply.* Neither an opposition nor a reply to a request for rehearing may be filed without Board authorization.

(5) *Panel rehearing.* If a decision is not a panel decision, the party requesting rehearing may request that a panel rehear the decision. A panel rehearing a procedural decision will review the decision for an abuse of discretion.

§ 41.126 Arbitration.

(a) Parties to a contested case may resort to binding arbitration to determine any issue in a contested case. The Office is not a party to the arbitration. The Board is not bound and may independently determine questions of patentability, jurisdiction, and Office practice.

(b) The Board will not authorize arbitration unless:

(1) It is to be conducted according to Title 9 of the United States Code.

(2) The parties notify the Board in writing of their intention to arbitrate.

(3) The agreement to arbitrate:

(i) Is in writing,

(ii) Specifies the issues to be arbitrated,

(iii) Names the arbitrator, or provides a date not more than 30 days after the execution of the agreement for the selection of the arbitrator, and

(iv) Provides that the arbitrator's award shall be binding on the parties and that judgment thereon can be entered by the Board.

(4) A copy of the agreement is filed within 20 days after its execution.

(5) The arbitration is completed within the time the Board sets.

(c) The parties are solely responsible for the selection of the arbitrator and the conduct of proceedings before the arbitrator.

(d) Issues not disposed of by the arbitration will be resolved in accordance with the procedures established in this subpart.

(e) The Board will not consider the arbitration award unless it:

(1) Is binding on the parties,

(2) Is in writing,

(3) States in a clear and definite manner each issue arbitrated and the disposition of each issue, and

(4) Is filed within 20 days of the date of the award.

(f) Once the award is filed, the parties to the award may not take actions inconsistent with the award. If the award is dispositive of the contested subject matter for a party, the Board may enter judgment as to that party.

§ 41.127 Judgment.

(a) *Effect within Office*—(1) *Estoppel.* A judgment disposes of all issues that were, or by motion could have properly been, raised and decided. A losing party who could have properly moved for relief on an issue, but did not so move, may not take action in the Office after the judgment that is inconsistent with that party's failure to move, except that a losing party shall not be estopped with respect to any contested subject matter for which that party was awarded a favorable judgment.

(2) *Final disposal of claim.* Adverse judgment against a claim is a final action of the Office requiring no further action by the Office to dispose of the claim permanently.

(b) *Request for adverse judgment.* A party may at any time in the proceeding request judgment against itself. Actions construed to be a request for adverse judgment include:

(1) Abandonment of an involved application such that the party no longer has an application or patent involved in the proceeding,

(2) Cancellation or disclaiming of a claim such that the party no longer has a claim involved in the proceeding,

(3) Concession of priority or unpatentability of the contested subject matter, and

(4) Abandonment of the contest.

(c) *Recommendation.* The judgment may include a recommendation for further action by the examiner or by the Director. If the Board recommends rejection of a claim of an involved application, the examiner must enter and maintain the recommended rejection unless an amendment or showing of facts not previously of record is filed which, in the opinion of the examiner, overcomes the recommended rejection.

(d) *Rehearing.* A party dissatisfied with the judgment may file a request for rehearing within 30 calendar days of the entry of the judgment. The request must specifically identify all matters the party believes to have been misapprehended or overlooked, and the place where the matter was previously addressed in a motion, opposition, or reply.

§ 41.128 Sanctions.

(a) The Board may impose a sanction against a party for misconduct, including:

(1) Failure to comply with an applicable rule or order in the proceeding;

(2) Advancing a misleading or frivolous request for relief or argument; or

(3) Engaging in dilatory tactics.

(b) Sanctions include entry of:

(1) An order holding certain facts to have been established in the proceeding;

(2) An order expunging, or precluding a party from filing, a paper;

(3) An order precluding a party from presenting or contesting a particular issue;

(4) An order precluding a party from requesting, obtaining, or opposing discovery;

(5) An order excluding evidence;

(6) An order awarding compensatory expenses, including attorney fees;

(7) An order requiring terminal disclaimer of patent term; or

(8) Judgment in the contested case.

§ 41.150 Discovery.

(a) *Limited discovery.* A party is not entitled to discovery except as authorized in this subpart. The parties may agree to discovery among themselves at any time.

(b) *Automatic discovery.* (1) Within 21 days of a request by an opposing party, a party must:

(i) Serve a legible copy of every requested patent, patent application, literature reference, and test standard mentioned in the specification of the party's involved patent or application, or application upon which the party will rely for benefit, and, if the requested material is in a language other than English, a translation, if available, and

(ii) File with the Board a notice (without copies of the requested materials) of service of the requested materials.

(2) Unless previously served, or the Board orders otherwise, any exhibit cited in a motion or in testimony must be served with the citing motion or testimony.

(c) *Additional discovery.* (1) A party may request additional discovery. The requesting party must show that such additional discovery is in the interests of justice. The Board may specify conditions for such additional discovery.

(2) When appropriate, a party may obtain production of documents and things during cross examination of an opponent's witness or during testimony authorized under § 41.156.

§ 41.151 Admissibility.

Evidence that is not taken, sought, or filed in accordance with this subpart shall not be admissible.

§ 41.152 Applicability of the Federal Rules of Evidence.

(a) *Generally.* Except as otherwise provided in this subpart, the Federal Rules of Evidence shall apply to contested cases.

(b) *Exclusions.* Those portions of the Federal Rules of Evidence relating to criminal proceedings, juries, and other matters not relevant to proceedings under this subpart shall not apply.

(c) *Modifications in terminology.* Unless otherwise clear from context, the following terms of the Federal Rules of Evidence shall be construed as indicated:

Appellate court means United States Court of Appeals for the Federal Circuit or a United States district court when judicial review is under 35 U.S.C. 146.

Civil action, civil proceeding, action, and *trial* mean contested case.

Courts of the United States, U.S. Magistrate, court, trial court, and *trier of fact* mean Board.

Hearing means:

(i) In Federal Rule of Evidence 703, the time when the expert testifies.

(ii) In Federal Rule of Evidence 804(a)(5), the time for taking testimony.

Judge means the Board.

Judicial notice means official notice.

Trial or hearing means, in Federal Rule of Evidence 807, the time for taking testimony.

(d) The Board, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.

§ 41.153 Records of the Office.

Certification is not necessary as a condition to admissibility when the evidence to be submitted is a record of the Office to which all parties have access.

§ 41.154 Form of evidence.

(a) Evidence consists of affidavits, transcripts of depositions, documents, and things. All evidence must be submitted in the form of an exhibit.

(b) *Translation required.* When a party relies on a document or is required to produce a document in a language other than English, a translation of the document into English and an affidavit attesting to the accuracy of the translation must be filed with the document.

(c) An exhibit must conform with the requirements for papers in § 41.106 of this subpart and the requirements of this paragraph.

(1) Each exhibit must have an exhibit label with a unique number in a range assigned by the Board, the names of the parties, and the proceeding number in the following format:

JONES EXHIBIT 2001
Jones v. Smith
Interference 104,999

(2) When the exhibit is a paper:

(i) Each page must be uniquely numbered in sequence, and

(ii) The exhibit label must be affixed to the lower right corner of the first page of the exhibit without obscuring information on the first page or, if obscuring is unavoidable, affixed to a duplicate first page.

(d) *Exhibit list.* Each party must maintain an exhibit list with the exhibit number and a brief description of each exhibit. If the exhibit is not filed, the exhibit list should note that fact. The Board may require the filing of a current exhibit list prior to acting on a motion.

§ 41.155 Objection; motion to exclude; motion in limine.

(a) *Deposition.* Objections to deposition evidence must be made during the deposition. Evidence to cure the objection must be provided during the deposition unless the parties to the deposition stipulate otherwise on the deposition record.

(b) *Other than deposition.* For evidence other than deposition evidence:

(1) *Objection.* Any objection must be filed within five business days of service of evidence, other than deposition evidence, to which the objection is directed. The objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence.

(2) *Supplemental evidence.* The party relying on evidence to which an objection is timely filed may respond to the objection by filing supplemental evidence within ten business days of service of the objection.

(c) *Motion to exclude.* A miscellaneous motion to exclude evidence must be filed to preserve any objection. The motion must identify the objections in the record in order and must explain the objections.

(d) *Motion in limine.* A party may file a miscellaneous motion in limine for a ruling on the admissibility of evidence.

§ 41.156 Compelling testimony and production.

(a) *Authorization required.* A party seeking to compel testimony or production of documents or things must file a miscellaneous motion for authorization. The miscellaneous motion must describe the general relevance of the testimony, document, or thing and must:

(1) In the case of testimony, identify the witness by name or title, and

(2) In the case of a document or thing, the general nature of the document or thing.

(b) *Outside the United States.* For testimony or production sought outside the United States, the motion must also:

(1) *In the case of testimony.* (i) Identify the foreign country and explain why the party believes the witness can be compelled to testify in the foreign country, including a description of the procedures that will be used to compel the testimony in the foreign country and an estimate of the time it is expected to take to obtain the testimony; and

(ii) Demonstrate that the party has made reasonable efforts to secure the agreement of the witness to testify in the United States but has been unsuccessful in obtaining the agreement, even though the party has offered to pay the expenses of the witness to travel to and testify in the United States.

(2) *In the case of production of a document or thing.* (i) Identify the foreign country and explain why the party believes production of the document or thing can be compelled in the foreign country, including a description of the procedures that will be used to compel production of the document or thing in the foreign country and an estimate of the time it is expected to take to obtain production of the document or thing; and

(ii) Demonstrate that the party has made reasonable efforts to obtain the agreement of the individual or entity having possession, custody, or control of the document to produce the document or thing in the United States but has been unsuccessful in obtaining that agreement, even though the party has offered to pay the expenses of producing the document or thing in the United States.

§ 41.157 Taking testimony.

(a) *Form.* Direct testimony must be submitted in the form of an affidavit except when the testimony is compelled under 35 U.S.C. 24, in which case it may be in the form of a deposition transcript.

(b) *Time and location.* (1) *Uncompelled direct testimony* may be taken at any time; otherwise, testimony may only be taken during such time period as the Board may authorize.

(2) *Other testimony.* (i) Except as the Board otherwise orders, authorized testimony may be taken at any reasonable time and location within the United States before any disinterested official authorized to administer oaths at that location.

(ii) Testimony outside the United States may only be taken as the Board specifically directs.

(c) *Notice of deposition.* (1) Prior to the taking of testimony, all parties to the proceeding must agree on the time and place for taking testimony. If the parties cannot agree, the party seeking the testimony must initiate a conference with the Board to set a time and place.

(2) Cross-examination should ordinarily take place after any supplemental evidence relating to the direct testimony has been filed and more than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. A party requesting cross-examination testimony of more than one witness may choose the order in which the witnesses are to be cross-examined.

(3) In the case of direct testimony, at least three business days prior to the conference in paragraph (c)(1) of this section, the party seeking the direct testimony must serve:

(i) A list and copy of each document under the party's control and on which the party intends to rely, and

(ii) A list of, and proffer of reasonable access to, any thing other than a document under the party's control and on which the party intends to rely.

(4) Notice of the deposition must be filed at least two business days before a deposition. The notice limits the scope of the testimony and must list:

(i) The time and place of the deposition,

(ii) The name and address of the witness,

(iii) A list of the exhibits to be relied upon during the deposition, and

(iv) A general description of the scope and nature of the testimony to be elicited.

(5) *Motion to quash.* Objection to a defect in the notice is waived unless a miscellaneous motion to quash is promptly filed.

(d) *Deposition in a foreign language.* If an interpreter will be used during the deposition, the party calling the witness must initiate a conference with the Board at least five business days before the deposition.

(e) *Manner of taking testimony.* (1) Each witness before giving a deposition shall be duly sworn according to law by the officer before whom the deposition is to be taken. The officer must be authorized to take testimony under 35 U.S.C. 23.

(2) The testimony shall be taken in answer to interrogatories with any questions and answers recorded in their regular order by the officer, or by some other disinterested person in the presence of the officer, unless the presence of the officer is waived on the record by agreement of all parties.

(3) Any exhibits relied upon must be numbered according to the numbering scheme assigned for the contested case and must, if not previously served, be served at the deposition.

(4) All objections made at the time of the deposition to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, the conduct of any party, and any other objection to the proceeding shall be noted on the record by the officer. Evidence objected to shall be taken subject to a ruling on the objection.

(5) When the testimony has been transcribed, the witness shall read and sign (in the form of an affidavit) a transcript of the deposition unless:

(i) The parties otherwise agree in writing, (ii) The parties waive reading and signature by the witness on the record at the deposition, or

(iii) The witness refuses to read or sign the transcript of the deposition.

(6) The officer shall prepare a certified transcript by attaching to the transcript of the deposition a certificate in the form of an affidavit signed and sealed by the officer. Unless the parties waive any of the following requirements, in which case the certificate shall so state, the certificate must state:

(i) The witness was duly sworn by the officer before commencement of testimony by the witness;

(ii) The transcript is a true record of the testimony given by the witness;

(iii) The name of the person who recorded the testimony and, if the officer did not record it, whether the testimony was recorded in the presence of the officer;

(iv) The presence or absence of any opponent;

(v) The place where the deposition was taken and the day and hour when the deposition began and ended;

(vi) The officer has no disqualifying interest, personal or financial, in a party; and

(vii) If a witness refuses to read or sign the transcript, the circumstances under which the witness refused.

(7) The officer must promptly provide a copy of the transcript to all parties. The proponent of the testimony must file the original as an exhibit.

(8) Any objection to the content, form, or manner of taking the deposition, including the qualifications of the officer, is waived unless made on the record during the deposition and preserved in a timely filed miscellaneous motion to exclude.

(f) *Costs.* Except as the Board may order or the parties may agree in writing, the proponent of the testimony shall bear all costs associated with the testimony, including the reasonable costs associated with making the witness available for the cross-examination.

§ 41.158 Expert testimony; tests and data.

(a) Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight. Testimony on United States patent law will not be admitted.

(b) If a party relies on a technical test or data from such a test, the party must provide an affidavit explaining:

(1) Why the test or data is being used,

(2) How the test was performed and the data was generated,

(3) How the data is used to determine a value,

(4) How the test is regarded in the relevant art, and

(5) Any other information necessary for the Board to evaluate the test and data.

Subpart E—Patent Interferences

§ 41.200 Procedure; pendency.

(a) A patent interference is a contested case subject to the procedures set forth in subpart D of this part.

(b) A claim shall be given its broadest reasonable construction in light of the specification of the application or patent in which it appears.

(c) Patent interferences shall be administered such that pendency before the Board is normally no more than two years.

§ 41.201 Definitions.

In addition to the definitions in §§ 41.2 and 41.100, the following definitions apply to proceedings under this subpart:

Accord benefit means Board recognition that a patent application provides a proper constructive reduction to practice under 35 U.S.C. 102(g)(1).

Constructive reduction to practice means a described and enabled anticipation under 35 U.S.C. 102(g)(1) in a patent application of the subject matter of a count. *Earliest constructive reduction to practice* means the first constructive reduction to practice that has been continuously disclosed through a chain of patent applications including in the involved application or patent. For the chain to be continuous, each subsequent application must have been co-pending under 35 U.S.C. 120 or 121 or timely filed under 35 U.S.C. 119 or 365(a).

Count means the Board's description of the interfering subject matter that sets

the scope of admissible proofs on priority. Where there is more than one count, each count must describe a patentably distinct invention.

Involved claim means, for the purposes of 35 U.S.C. 135(a), a claim that has been designated as corresponding to the count.

Senior party means the party entitled to the presumption under § 41.207(a)(1) that it is the prior inventor. Any other party is a *junior party*.

Threshold issue means an issue that, if resolved in favor of the movant, would deprive the opponent of standing in the interference. Threshold issues may include:

(1) No interference-in-fact, and

(2) In the case of an involved application claim first made after the publication of the movant's application or issuance of the movant's patent:

(i) Repose under 35 U.S.C. 135(b) in view of the movant's patent or published application, or

(ii) Unpatentability for lack of written description under 35 U.S.C. 112(1) of an involved application claim where the applicant suggested, or could have suggested, an interference under § 41.202(a).

§ 41.202 Suggesting an interference.

(a) *Applicant.* An applicant, including a reissue applicant, may suggest an interference with another application or a patent. The suggestion must:

(1) Provide sufficient information to identify the application or patent with which the applicant seeks an interference,

(2) Identify all claims the applicant believes interfere, propose one or more counts, and show how the claims correspond to one or more counts,

(3) For each count, provide a claim chart comparing at least one claim of each party corresponding to the count and show why the claims interfere within the meaning of § 41.203(a),

(4) Explain in detail why the applicant will prevail on priority,

(5) If a claim has been added or amended to provoke an interference, provide a claim chart showing the written description for each claim in the applicant's specification, and

(6) For each constructive reduction to practice for which the applicant wishes to be accorded benefit, provide a chart showing where the disclosure provides a constructive reduction to practice within the scope of the interfering subject matter.

(b) *Patentee.* A patentee cannot suggest an interference under this section but may, to the extent permitted under § 1.99 and § 1.291 of this title, alert the examiner of an application claiming interfering subject matter to the possibility of an interference.

(c) *Examiner.* An examiner may require an applicant to add a claim to provoke an interference. Failure to satisfy the requirement within a period (not less than one month) the examiner sets will operate as a concession of priority for the subject matter of the claim. If the interference would be with a patent, the applicant must also comply with paragraphs (a)(2) through (a)(6) of this section. The claim the examiner proposes to have added must, apart from the question of priority under 35 U.S.C. 102(g):

(1) Be patentable to the applicant, and

(2) Be drawn to patentable subject matter claimed by another applicant or patentee.

(d) *Requirement to show priority under 35 U.S.C. 102(g).* (1) When an applicant has an earliest constructive reduction to practice that is later than the apparent earliest constructive reduction to practice for a patent or published application claiming interfering subject matter, the applicant must show why it would prevail on priority.

(2) If an applicant fails to show priority under paragraph (d)(1) of this section, an administrative patent judge may nevertheless declare an interference to place the applicant under an order to show cause why judgment should not be entered against the applicant on priority. New evidence in support of priority will not be admitted except on a showing of good cause. The Board may authorize the filing of motions to redefine the interfering subject matter or to change the benefit accorded to the parties.

(e) *Sufficiency of showing.* (1) A showing of priority under this section is not sufficient unless it would, if unrebutted, support a determination of priority in favor of the party making the showing.

(2) When testimony or production necessary to show priority is not available without authorization under § 41.150(c) or § 41.156(a), the showing shall include:

(i) Any necessary interrogatory, request for admission, request for production, or deposition request, and

(ii) A detailed proffer of what the response to the interrogatory or request would be expected to be and an explanation of the relevance of the response to the question of priority.

§ 41.203 Declaration.

(a) *Interfering subject matter.* An interference exists if the subject matter of a claim of one party would, if prior art, have anticipated or rendered obvious the subject matter of a claim of the opposing party and vice versa.

(b) *Notice of declaration.* An administrative patent judge declares the patent interference on behalf of the Director. A notice declaring an interference identifies:

(1) The interfering subject matter;

(2) The involved applications, patents, and claims;

(3) The accorded benefit for each count; and

(4) The claims corresponding to each count.

(c) *Redeclaration.* An administrative patent judge may redeclare a patent interference on behalf of the Director to change the declaration made under paragraph (b) of this section.

(d) A party may suggest the addition of a patent or application to the interference or the declaration of an additional interference. The suggestion should make the showings required under § 41.202(a) of this part.

§ 41.204 Notice of basis for relief.

(a) *Priority statement.* (1) A party may not submit evidence of its priority in addition to its accorded benefit unless it files a statement setting forth all bases on which the party intends to establish its entitlement to judgment on priority.

(2) The priority statement must:

(i) State the date and location of the party's earliest corroborated conception,

(ii) State the date and location of the party's earliest corroborated actual reduction to practice,

(iii) State the earliest corroborated date on which the party's diligence began, and

(iv) Provide a copy of the earliest document upon which the party will rely to show conception.

(3) If a junior party fails to file a priority statement overcoming a senior party's accorded benefit, judgment shall be entered against the junior party absent a showing of good cause.

(b) *Other substantive motions.* The Board may require a party to list the motions it intends to file, including sufficient detail to place the Board and the opponent on notice of the precise relief sought.

(c) *Filing and service.* The Board will set the times for filing and serving statements required under this section.

§ 41.205 Settlement agreements.

(a) *Constructive notice; time for filing.* Pursuant to 35 U.S.C. 135(c), an agreement or understanding, including collateral agreements referred to therein, made in connection with or in contemplation of the termination of an interference must be filed prior to the termination of the interference between

the parties to the agreement. After a final decision is entered by the Board, an interference is considered terminated when no appeal (35 U.S.C. 141) or other review (35 U.S.C. 146) has been or can be taken or had. If an appeal to the U.S. Court of Appeals for the Federal Circuit (under 35 U.S.C. 141) or a civil action (under 35 U.S.C. 146) has been filed the interference is considered terminated when the appeal or civil action is terminated. A civil action is terminated when the time to appeal the judgment expires. An appeal to the U.S. Court of Appeals for the Federal Circuit, whether from a decision of the Board or a judgment in a civil action, is terminated when the mandate is issued by the Court.

(b) *Untimely filing.* The Chief Administrative Patent Judge may permit the filing of an agreement under paragraph (a) of this section up to six months after termination upon petition and a showing of good cause for the failure to file prior to termination.

(c) *Request to keep separate.* Any party to an agreement under paragraph (a) of this section may request that the agreement be kept separate from the interference file. The request must be filed with or promptly after the agreement is filed.

(d) *Access to agreement.* Any person, other than a representative of a Government agency, may have access to an agreement kept separate under paragraph (c) of this section only upon petition and on a showing of good cause. The agreement will be available to Government agencies on written request.

§ 41.206 Common interests in the invention.

An administrative patent judge may decline to declare, or if already declared the Board may issue judgment in, an interference between an application and another application or patent that are commonly owned.

§ 41.207 Presumptions.

(a) *Priority*—(1) *Order of invention.* Parties are presumed to have invented interfering subject matter in the order of the dates of their accorded benefit for each count. If two parties are accorded the benefit of the same earliest date of constructive reduction to practice, then neither party is entitled to a presumption of priority with respect to the other such party.

(2) *Evidentiary standard.* Priority may be proved by a preponderance of the evidence except a party must prove priority by clear and convincing evidence if the date of its earliest constructive reduction to practice is after the issue date of an involved patent or the publication date under 35 U.S.C. 122(b) of an involved application or patent.

(b) *Claim correspondence.* (1) For the purposes of determining priority and derivation, all claims of a party corresponding to the count are presumed to stand or fall together. To challenge this presumption, a party must file a timely substantive motion to have a corresponding claim designated as not corresponding to the count. No presumption based on claim correspondence regarding the grouping of claims exists for other grounds of unpatentability.

(2) A claim corresponds to a count if the subject matter of the count, treated as prior art to the claim, would have anticipated or rendered obvious the subject matter of the claim.

(c) *Cross-applicability of prior art.* When a motion for judgment of unpatentability against an opponent's claim on the basis of prior art is granted, each of the movant's claims corresponding to the same count as the opponent's claim will be presumed to be unpatentable in view of the same prior art unless the movant in its motion rebuts this presumption.

§ 41.208 Content of substantive and responsive motions.

The general requirements for motions in contested cases are stated at § 41.121(c).

(a) In an interference, substantive motions must:

(1) Raise a threshold issue,

(2) Seek to change the scope of the definition of the interfering subject matter or the correspondence of claims to the count,

(3) Seek to change the benefit accorded for the count, or

(4) Seek judgment on derivation or on priority.

(b) To be sufficient, a motion must provide a showing, supported with appropriate evidence, such that, if unrebutted, it would justify the relief sought. The burden of proof is on the movant.

(c) *Showing patentability.* (1) A party moving to add or amend a claim must show the claim is patentable.

(2) A party moving to add or amend a count must show the count is patentable over prior art.

Dated: July 28, 2004.

Jon W. Dudas,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

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August 12, 2004

Part III

Department of Labor

Employment and Training Administration

20 CFR Part 603

Federal-State Unemployment Compensation Program (UC); Confidentiality and Disclosure of State UC Information; Proposed Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 603

RIN 1205–AB18

Federal-State Unemployment Compensation Program (UC); Confidentiality and Disclosure of State UC Information

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Proposed Rulemaking (NPRM); request for comments.

SUMMARY: This proposed rule would set forth statutory confidentiality and disclosure requirements of Title III of the Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) concerning unemployment compensation (UC) information. It would also amend the Income and Eligibility Verification System (IEVS) regulations, a system of required information sharing primarily among state and local agencies administering several federally assisted programs.

DATES: Written comments must be submitted on or before October 12, 2004.

ADDRESSES: Comments may be mailed or delivered to Cheryl Atkinson, Administrator, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210. Comments may be submitted electronically to the Office of Workforce Security at the e-mail address: *confidentialityrule@dol.gov*. Receipt of submissions, whether by U.S. mail, other delivery, or e-mail, will not be acknowledged.

All comments will be available for public inspection and copying during normal business hours at the Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210. Copies of the proposed rule are available in alternate formats of large print and electronic file on computer disk, which may be obtained at the above-stated address. The proposed rule is also available at the Web address *http://www.workforcesecurity.doleta.gov*.

FOR FURTHER INFORMATION CONTACT: Gerard Hildebrand, Chief, Division of Legislation, Office of Workforce Security, Employment and Training Administration, (202) 693–3038 (this is not a toll-free number) or 1–877–889–5627 (TTY), or by e-mail at *hildebrand.gerard@dol.gov*.

SUPPLEMENTARY INFORMATION:

Background

On March 23, 1992, the Employment and Training Administration (ETA) published a proposed rule (57 FR 10063) concerning the confidentiality and disclosure of state UC information. The proposed rule was never finalized. Commenters expressed different views over how restrictive the rule should be, and some found the proposed rule unnecessarily lengthy and complex. Given the lapse of time, ETA has decided to publish a new proposed rule, described below.

Discussion of Proposed Rule

As explained below, ETA believes that confidentiality protections for UC information (meaning information in the records of a state or state UC agency that pertains to the administration of state UC law) are still necessary. Comments on the 1992 proposal will become part of the new rulemaking record and were considered in developing this proposed rule. This proposed rule sets forth requirements very similar to those in the 1992 proposal, but it would allow more optional state disclosures. It would also now permit the Department to waive safeguards and agreement requirements for disclosures to Federal agencies which have in place adequate alternative safeguards for protecting the confidentiality of information and an appropriate method of paying or reimbursing the state UC agency for costs involved in such disclosures. In addition, this proposed rule is streamlined. Whereas the text of the 1992 proposal contained 12 subparts and 77 sections, this proposal is condensed into three subparts and 16 sections. Further, it uses plain language and a user-friendly question-and-answer format.

This proposed rule would implement Federal UC law provisions concerning confidentiality and disclosure of UC information and establish uniform minimum requirements for the payment of costs, safeguards, and data-sharing agreements to ensure responsible use when UC information is disclosed. The confidentiality requirement implemented by this rule is derived from Section 303(a)(1), SSA. The disclosure requirements are from Sections 303(a)(7), (c)(1), (d), (e), (f), (h), and (i) of the SSA and Section 3304(a)(16), FUTA. This proposed rule would revise the regulations at 20 CFR Part 603, which currently implement only Section 303(f) (concerning IEVS) of the SSA, to implement all of these statutory provisions. (Section 303(f) requires that each state UC agency provide for information to be requested and exchanged with state and local agencies administering several federally assisted programs for purposes of income and eligibility verification, in accordance with a state system which meets the requirements of Section 1137 of the SSA.) The disclosure provisions that this rule would implement all require disclosure to government entities, but they vary with respect to the specific information to be disclosed and the terms and conditions of disclosure.

This rule does not address the scope of the Secretary of Labor's authority under Section 303(a)(6) of the SSA to require reports from the states. We note this because the preamble to the 1992 proposed rule asked for comments concerning the scope of this provision. We have decided not to address this matter in this proposed rule.

The confidentiality and disclosure requirements in Title III of the SSA relating to UC information are conditions for receipt of grants by the states for UC administration. The disclosure requirements in the FUTA are conditions required of a state in order for employers in that state to receive credit against the Federal unemployment tax under 26 U.S.C. 3302.

Other Federal laws may require use or disclosure of confidential UC information. For example, the Workforce Investment Act (WIA) of 1998, Pub. L. 105–220, requires states to measure their progress in providing services funded under Title I of the WIA against state and local performance measures using "quarterly wage records, consistent with State law." 29 U.S.C. 2871(f)(2); 20 CFR 666.150(a). Because these laws do not condition receipt of UC grants under the SSA or certification for employer tax credits under FUTA on such use or disclosure, this proposed rule would not implement these laws. However, the disclosure of confidential UC information in compliance with the WIA and other Federal laws would be permitted under the general exceptions to confidentiality in § 603.5 of this proposed rule. (For more information on the requirement to use wage records under the WIA, see 20 CFR 666.150.) ETA strongly encourages states whose laws do not permit disclosure for WIA purposes to amend their laws.

We believe that these proposed regulations are necessary and important for several reasons. The Federal Privacy Act does not protect the confidentiality

of UC information even though it is the same type of information, wage and employment information, that is highly protected when collected for the administration of other Federal programs, such as Social Security and the Federal income tax. Except for its provisions governing the collection of Social Security numbers, the Privacy Act does not apply to state records containing UC information because they are not Federal records. Although state laws address the privacy of such records, they do so to varying degrees. At the same time, as mentioned, a number of provisions of Federal law now require use or disclosure of confidential UC information. States have repeatedly sought guidance from the Department of Labor on confidentiality and disclosure issues. Further, several of the provisions in Title III, SSA, instruct the Secretary of Labor to establish safeguards to protect the confidentiality of UC information when disclosed.

The proposed rule is based on several "fair information" principles that are fundamental to any confidentiality policy and are reflected in a number of sections throughout. The principles include notice, choice, access and amendment, security safeguards, and accountability.

Notice. Subjects of an information collection (persons or organizations from or about whom information is collected) should be notified what information is collected and of the possible uses of that information. Under this proposed rule, state UC agencies would be required to inform claimants and employers of the uses of UC information collected, including possible non-UC uses. Specifically, Section 603.11 of this proposed rule would require states to provide individualized notice to claimants at the time of filing an initial claim and periodically thereafter, and to employers on their quarterly wage report form or reimbursement billing, that confidential UC information may be requested and disclosed. A requirement for notice to claimants exists in current part 603. This proposed rule would extend a notice requirement to employers.

Choice. To the extent possible, subjects of an information collection should have choices about how information about them is used. Proposed § 603.5(c) and (d) would allow states to disclose information to an individual, employer, their agent or attorney, or to another third party, on the basis of informed consent. In the case of disclosure to a third party other than an agent or attorney, the proposed rule would require consent to be in writing and contain features, such as specific identification of the information to be disclosed and the specific purposes for the disclosure, ensuring the consent is truly informed.

Access and amendment. Subjects of an information collection should have the right to access and amend information about them. This is important to ensure the accuracy of information that will be used to make decisions about individuals (such as eligibility for government benefits or services). UC information is used to determine whether an individual is eligible for benefits or an employer is liable for UC taxes. The opportunity to access and amend UC information usually occurs during the claims determination process or when tax coverage decisions are made, because individuals and employers participate and provide input into these processes. Section 603.5(c) would also permit states to provide individuals or employers access to UC information about themselves for non-UC purposes.

Security safeguards. Security controls are important to protect the confidentiality and integrity of data, including data shared with other government agencies or recipients. Section 603.4(b) of this proposed rule would require states to maintain the "confidentiality of any UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars" except as provided in this regulation. This would require that state agencies employ effective methods to protect confidentiality of UC information. These methods may include management, operational, and technical security controls.

Section 603.9 would set forth minimum security safeguards that state agencies must require of recipients of disclosed data to ensure continued data confidentiality and integrity. For example, § 603.9(b)(1)(ii) and (iii) would require that information be stored in a place physically secure from access by unauthorized persons and maintained in a way that unauthorized persons cannot obtain the information by any means. Section 603.9(b)(1)(v) would also require instruction of personnel about confidentiality requirements and signed acknowledgments that the instruction occurred. Section 603.9(b)(1)(vi) would require the return or destruction of disclosed UC information once the purpose for which the information was disclosed has been served. Section 603.9(b)(1)(vii) would require states to maintain a tracking system sufficient to allow an audit of compliance with this regulation's requirements. Section 603.10(b)(1)(vi) would require data-sharing agreements to include provision for state on-site inspection of recipients to assure compliance with the security safeguards.

Accountability. Mechanisms should exist to ensure the accountability of individuals and entities handling confidential data. Section 603.4(c) of this proposed rule would require state law to provide penalties for any unauthorized disclosure of confidential UC information. Section 603.9(b)(1)(v) would require state agencies to inform employees of the applicable sanctions for unauthorized disclosures. Section 603.9(a) would further require states or state agencies to subject recipients of confidential UC information under data-sharing agreements to penalties provided by state law for unauthorized disclosure. Section 603.10(c) would require suspension and ultimately termination of any data-sharing agreement or contract if a recipient fails to follow the specified safeguards. This provision would also require states to take other action against an entity violating a data-sharing agreement.

Section-by-Section Description of Proposed Rule

Subpart A—Confidentiality and Disclosure Requirements in General

Subpart A sets forth the purpose and scope of the proposed rule, as well as definitions that would apply to subparts B and C.

Section 603.1, Purpose and Scope

This section describes the purposes and scope of proposed new part 603, which differ materially from the purposes and scope of the present part 603. While the present part 603 addresses only the requirements concerning a state UC agency's participation in the IEVS under Section 303(f) of the SSA, new part 603 would address additional disclosure requirements in Federal UC law and the basic requirement of confidentiality derived from Section 303(a)(1) of the SSA. New part 603 would apply to states and state UC agencies, as defined in § 603.2(f) and (g).

Section 603.2, Definitions

This section defines the terms that would apply to new part 603.

Paragraph (a) defines "claim information" as information about:

- Whether an individual is receiving, has received, or has applied for UC;
- The amount of compensation the individual is receiving or is entitled to receive;
- The individual's current (or most recent) home address; and, for purposes of subpart C (concerning disclosure to an IEVS),
- Whether the individual has refused an offer of work and, if so, a description of the job offered including the terms, conditions, and rate of pay; and
- Any other information contained in the records of the state UC agency that is needed by the requesting agency to verify eligibility for, and the amount of, benefits.

Paragraph (b) defines "confidential UC information" and "confidential information" as any UC information required to be kept confidential under § 603.4.

Paragraph (c) defines "public domain information" as:

- Information about the organization of the state and the state UC agency and appellate authorities, including the names and positions of officials and employees thereof;
- Information about the state UC law (and applicable Federal law) provisions, rules, regulations, and interpretations thereof, including statements of general policy and interpretations of general applicability, appeals records and decisions, and precedential determinations on coverage of employers, employment, and wages; and
- Any agreement of whatever kind or nature, including interstate arrangements and reciprocal agreements and any agreement with the Department of Labor or the Secretary, relating to the administration of the state UC law.

Paragraph (d) defines "public official" as an official, agency, or public entity within the executive branch of Federal, state, or local government who (or which) has responsibility for administering or enforcing a law, or a legislator in the Federal, state, or local government with oversight responsibility for the UC program.

Paragraph (e) defines "Secretary" and "Secretary of Labor" to mean the cabinet officer heading the United States Department of Labor, or his or her designee.

Paragraph (f) defines "state" to mean one of the "states" included in the federal-state UC program, including Puerto Rico, the United States Virgin Islands, and the District of Columbia.

Paragraph (g) defines "state UC agency" to mean an agency charged with administration of a state's UC law. The proposed definition does not include Employment Service offices or state revenue departments except when administering a state's UC law. However, officials of such agencies may be able to obtain access to UC information under the exception to confidentiality for public officials, under § 603.5(e).

Paragraph (h) defines "state UC law" to mean the UC law of a state, approved under the FUTA, 26 U.S.C. § 3304(a). Any law of a state (including official interpretations thereof) that may affect state eligibility for Title III, SSA, administrative grants or certification under the FUTA is part of the "state UC law" as defined in this proposed rule. This definition is not intended to cover Wagner-Peyser Act-funded programs or programs funded under the WIA.

Paragraph (i) defines "unemployment compensation (UC)" as cash benefits to individuals with respect to their unemployment.

Paragraph (j) defines "UC information" and "state UC information" as information in the records of a state or state UC agency that pertains to the administration of the state UC law. This definition includes information pertaining to the administration of the state UC law regardless of whether that information is housed by the state UC agency. For example, the definition includes employer UC tax rates, UC tax identification numbers, and claimant weekly benefit amounts, even when those records are housed by a tax agency.

The definition also includes state wage reports, collected under the IEVS required by Section 1137, SSA, that are obtained by the state UC agency for determining UC monetary eligibility or are downloaded to the state UC agency's files as a result of a crossmatch. It does not include IEVS records collected by a state tax department that are neither used for determining UC eligibility nor downloaded to the state UC agency's files. Section 1137(a)(5)(B), SSA, gives the Secretary of Health and Human Services (HHS) primary authority to establish safeguards to protect IEVS records against "unauthorized disclosure for other [non-IEVS] purposes." The Department of Labor has authority only to establish safeguards for IEVS records "in the case of the unemployment compensation program," and under Title III, SSA. Thus, the Department of Labor is responsible for establishing safeguards only with respect to IEVS records obtained by a state UC agency for determining benefit eligibility, or copies of IEVS records that have been disclosed to the state UC agency as a result of a crossmatch.

The proposed definition of "UC information" and "state UC information" does not include any information in a state Directory of New Hires, even when the directory is maintained by the state UC agency, since these records are collected for purposes of complying with Title IV, SSA (concerning Federal aid to states for services to needy families with children and for child-welfare services). However, once information from a state directory is disclosed to the state UC agency for UC uses, the disclosed information becomes part of that agency's UC information, and that information would be subject to this proposed rule.

Further, the definition does not include the personnel or fiscal information of a state UC agency. In addition, the proposed definition of "UC information" and "state UC information" does not include information about employment service activities or job training activities, even though such activities may be performed within the same umbrella agency where UC activities are performed, because such information does not pertain to the administration of the state UC law.

Finally, the definition does not include records of the following Federal UC and benefit programs: the Unemployment Compensation for Federal Employees (UCFE) program (5 U.S.C. 8501–8508); the Unemployment Compensation for Ex-Servicemembers (UCX) program (5 U.S.C. 8521–8525); the Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) programs (19 U.S.C. 2271–2321); the NAFTA Transitional Adjustment Assistance (NAFTA-TAA) program (19 U.S.C. 2331) (which is being phased out); and the Disaster Unemployment Assistance (DUA) program (42 U.S.C. 5171); or any Federal UC benefit extension program. This is because such information pertains to the administration of Federal, not state, UC law and is covered by other regulations, operating instructions, and agreements with states.

Paragraph (k) defines "Wage information" to mean information in the records of a state UC agency (and, for purposes of § 603.23, information reported under provisions of state law which fulfill the requirements of Section 1137 of the SSA) about the wages paid to an individual, the Social Security account number (or numbers) of such individual, and the name, address, state, and Federal employer identification number of the employer

who paid such wages to such individual.

Subpart B—Confidentiality and Disclosure Requirements

Subpart B sets forth the basic proposed requirement of confidentiality, permissible exceptions to the rule of confidentiality, and mandatory disclosure requirements. It also proposes requirements on: (1) Payment of costs (for disclosures of UC information which are not made in the course of the administration of the state UC laws), (2) safeguards, (3) agreements between the state UC agency and agencies or entities requesting confidential UC information, which set forth the terms and conditions for making such disclosures and the remedies that apply in the case of breach of an agreement, and (4) conformity and substantial compliance with this proposed rule.

Section 603.3, Purpose and Scope

This section sets forth the purpose and scope of proposed subpart B. It expressly states that the purpose of subpart B is to set forth the requirements of Section 303(a)(1) of the SSA, as such requirements concern the confidentiality of state UC information, to implement the disclosure requirements of Sections 303(a)(7), (c)(1), (d), (e), (h), and (i), SSA, and Section 3304(a)(16), FUTA, and to establish uniform minimum requirements for the payment of costs, safeguards, data-sharing agreements when UC information is disclosed, and conformity and substantial compliance with this proposed rule. Subpart B would apply to states and state UC agencies, as defined in § 603.2(f) and (g).

Section 603.4, Confidentiality Requirement of Federal UC Law

Paragraph (a) of § 603.4 quotes the "methods of administration" requirement of Section 303(a)(1) of the SSA, which is the basis for the confidentiality requirement.

Paragraph (b) sets forth the Department's interpretation of Section 303(a)(1), SSA, as including a basic requirement of confidentiality. It would require states to maintain the confidentiality of any UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and to include provision for barring the disclosure of any such information, except as provided in new part 603.

The confidentiality requirement has its origin in the beginning of the program and is derived from Section 303(a)(1) of the SSA. Section 303(a)(1), SSA, requires states to provide in their laws for such "methods of administration" as the Secretary of Labor determines are "reasonably calculated to insure full payment of unemployment compensation when due." From the early years of the program this provision has been interpreted to require the confidentiality of information collected from individuals and employers for UC program administration. Confidentiality is necessary to avoid deterring individuals from claiming benefits or exercising their rights, to encourage employers to provide information necessary for program operations, to avoid interference with the administration of the UC program, and to avoid notoriety for the program if program information were misused.

Although the Department of Labor's interpretation of Section 303(a)(1), SSA, as requiring confidentiality is longstanding, it has not previously been set forth in regulations. However, Unemployment Insurance Program Letters (UIPLs) 23–96 ("Disclosure of Confidential Employment Information to Private Entities") and 34–97 ("Disclosure of Confidential Unemployment Compensation Information"), which would be superseded upon completion of this Rulemaking, set forth the confidentiality requirement.

The confidentiality requirement would apply, by its express terms, only to state information. ("UC information" is information that "pertain[s] to administration of the State UC law * * *". (Emphasis added.)) Nevertheless, the regulations and operating instructions governing the Federal UC and benefit programs of UCFE, UCX, TAA, ATAA and DUA require states to apply the same state law confidentiality protections that apply to state UC program information to information of those Federal UC and benefit programs. (*See* UCFE—20 CFR 609.13(b); UCX—20 CFR 614.14(b); TAA and ATAA—20 CFR 617.57(b); and DUA—20 CFR § 625.16(b).) Thus, in order to fulfill their responsibilities under the respective Federal program regulations and their administrative agreements with the Secretary of Labor, the states would need to apply the confidentiality protections of state law conforming with these part 603 proposed regulations to UCFE, UCX, TAA, ATAA and DUA program information. In addition, in accordance with § 603.6, states would need to apply the disclosure provisions of proposed part 603 to state-held information from the Federal UC and benefit programs of UCFE, UCX, TAA and ATAA (except, as described in the following paragraph, for confidential business information held by the states under the TAA program), and DUA, as well as to state UC information.

The disclosure provisions of proposed part 603 would not apply, however, to the confidential business information that the states collect under the TAA program, as reauthorized by the Trade Act of 2002, P.L. 107–210, or collected under the NAFTA–TAA program, which is being phased out. A state may, under the reauthorized and expanded TAA program, collect confidential business information upon request by the Secretary of Labor under authority of Section 221(a)(2) of the Trade Act (19 U.S.C. 2271(a)(2)), which requires a state to "assist" the Secretary of Labor in the review of a petition for certification of eligibility to apply for benefits by "verifying such information and providing such other assistance as the Secretary may request." This information concerns changes in sales or production, imports of competitive articles, and shifts in production. Employers and their customers would be very reluctant to disclose this business information to the state were it subject to disclosure under the proposed exceptions to confidentiality in § 603.5 or the mandatory disclosure requirements of § 603.6. A proposed rulemaking to implement the reauthorized TAA program will address the confidentiality of this business information.

Paragraph (c) would require each state law to contain provisions that are interpreted and applied consistently with the requirements of this subpart and provide for penalties for any disclosure of confidential information that is inconsistent with any provision of this subpart.

Section 603.5, Exceptions to the Confidentiality Requirement

This section sets forth the permissible exceptions to the confidentiality requirement. Disclosure would be permissible under exceptions at paragraphs (a) through (g) only if authorized by state law and if the state determines the resources required for such disclosure does not interfere with the efficient administration of the state UC program and law. Disclosure is permissible under exceptions (h) through (j) without such restriction.

Paragraph (a) would provide that information in the public domain, as defined in § 603.2(c), is not covered by

the confidentiality requirement. This means it would be up to the state to determine whether and how much of such information is open to the public or is kept confidential.

Some UC information, such as employer names and addresses, is public in the sense that it is available from other public sources like telephone directories but is not public domain information for purposes of this rule.

Appeals hearing records and decisions are included in the definition of "public domain information" and, therefore, would be excluded from the confidentiality requirement. The Department of Labor has historically stated, and repeats here, that the public interest in proper administration of the UC program, specifically in payments of benefits only to eligible individuals, and in open governmental adjudicatory proceedings (to preserve a fair process to claimants and employers by avoiding star-chamber-type proceedings), is served by open hearings and hearing records. However, nothing in the proposed rule would prohibit states from making agency hearings or hearing records confidential as a matter of state law or practice.

Paragraph (b) would provide that the confidentiality requirement does not apply to essential program activities, *e.g.* those activities relating to the taking of claims for UC, the determination of eligibility (including appeals), the payment of benefits, the determination of employer liability, the collection of amounts due the state's unemployment fund, or any other activity directly related to the administration of the UC program. As a specific example, Section 303(g), SSA, permits states to withhold UC payable under state laws to recover overpayments of benefits made to individuals by another state or to recover an overpayment of state UC from a payment made under a Federal unemployment benefit or allowance program if the state has entered into an agreement with the Secretary of Labor under Section 303(g)(2), SSA, and if it reciprocally recovers overpayments made under a Federal unemployment benefit or allowance program from state payments. Disclosure of information which is necessary for purposes of carrying out these interstate and cross-program recoveries is permissible under this section (and, as discussed below, such disclosure is required under § 603.6(a)).

The Department of Labor emphasizes that paragraph (b) applies only when disclosure is *necessary* for the proper administration of the UC program. Redisclosure by a recipient for any separate or non-essential purpose is not authorized under this exception. As a result, prior to any disclosure under this paragraph, states are expected to take reasonable measures to assure that no impermissible redisclosure occurs. If, for example, information is provided to another state's UC agency, this may be as simple as assuring that a state's laws contain similar confidentiality requirements. In the case of disclosure to an agent or contractor, such as a collections agency, this means building confidentiality requirements and safeguards into the contract.

Paragraph (c) would permit disclosure of UC information about an individual to that individual, or of UC information about an employer to that employer.

Paragraph (d) would permit disclosure of UC information on the basis of informed consent to: (1) An agent or attorney of an individual, of information that pertains to that individual, or to an agent or attorney of an employer, of information that pertains to that employer, and (2) to a third party only if that entity obtains a written release from the individual or employer to whom the information pertains. In the case of disclosures to an agent or attorney, the agent or attorney must present a written release from the individual or employer being represented, or, if a written release is impossible or impracticable to obtain, such other form of consent as is permitted by the state UC agency in accordance with state law. In the case of disclosures to a third party, the release must be signed and must include the following statements:

- Specific identification of the information that is to be disclosed;
- That state government files will be accessed to obtain that information;
- The specific purpose or purposes for which the information is sought and a statement that information obtained under the release will be used only for that purpose or purposes; and
- The parties who may receive the information released.

The purpose specified in the release must be limited to providing a service or benefit to the individual signing the release that such individual expects to receive as a result of signing the release, or carrying out administration or evaluation of a public program to which the release pertains. Further, payment of costs, safeguards, and agreements would be required, as provided in proposed §§ 603.8 through 603.10. Also, the states would be required by proposed §§ 603.9 and 603.10 to impose certain penalties for misuse of data, additional audits, and additional terms in disclosure agreements.

The principle behind disclosure to a third party on the basis of informed consent is that individuals and employers should be able to waive their privacy when they believe it is in their interest to do so. The confidentiality requirement exists to serve the interests of individuals and employers as well as the needs of the federal-state UC program. However, as described, additional conditions would be required because of the greater potential threat to employer or individual privacy posed by third-party collection, storage, maintenance, use, and possible misuse of confidential UC information. This question is dealt with in Unemployment Insurance Program Letter 23–96 ("Disclosure of Confidential Employment information to Private Entities," 61 FR 28236), which would be superseded upon completion of this rulemaking.

Finally, the Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign), P.L. No. 106–229, may apply where one or more parties wish to use an electronic informed consent release (§ 603.5(d)) or a disclosure agreement (§ 603.10). E-Sign, among other things, sets forth the circumstances under which electronic signatures, contracts, and other records relating to such transactions (in lieu of paper documents) are legally binding. Thus, an electronic communication may suffice under E-Sign to establish a legally binding contract. The states would need to consider E-Sign's application to these informed consent releases and disclosure agreements. In particular, a state must, to conform and substantially comply with this proposed regulation, assure that these informed consent releases and disclosure agreements would be legally enforceable. If an informed consent release or disclosure agreement is to be effectuated electronically, the state would have to determine whether E-Sign applies to that transaction, and, if so, make certain that the transaction satisfies the conditions imposed by E-Sign. The state would also be required to make certain that the electronic transaction complies with every other condition necessary to make it legally enforceable. A note following proposed § 603.5(d) explains this.

Paragraph (e) would allow disclosure of UC information to a public official in the performance of his or her official duties. Since the 1970s, the Department of Labor's guidance to states has recognized this exception, which allows for a variety of uses of UC information that ETA believes are beneficial, such as law enforcement, fraud and benefit accuracy in programs not addressed by

Federal UC law (for example, Black Lung and state workers' compensation programs), program assessment (for example, of WIA and Vocational Education programs), and research.

"Performance of official duties" means administration or enforcement of law or, in the case of the legislative branch, oversight of UC law. It does not mean the conduct of research by an individual at a public or private university, although, where appropriate, a researcher could obtain access to confidential UC information under the exceptions provided for in paragraph (f) (agent or contractor of a public official) or (d)(2) (disclosure to a third party on the basis of informed consent), discussed elsewhere. ETA believes that there is less risk of unauthorized use or disclosure of UC information if responsibility for safeguarding confidentiality rests within the executive or legislative branches of government. ETA also believes that limiting access within the legislative branch to those legislators who need the information to help oversee the UC program further minimizes the possibility of unauthorized use.

Paragraph (f) would allow disclosure of UC information to an agent or contractor of a public official to whom disclosure is permissible under paragraph (e). This provision takes into account that research is often contracted out by public agencies. If confidential UC information could not be disclosed to agents or contractors of public officials, valuable research might be forgone or become more expensive, as agencies would have to undertake interviews of program participants in order to gather program evaluation information. A public official, ideally one with responsibility for the program or initiative on which research is being conducted, would be required to enter into the written agreement required by proposed § 603.10 and be held responsible for use of the information by the contractor or agent. Redisclosure of such information by a public official to an agent or contractor would be permitted only as provided in proposed § 603.9(c).

When possible, states should provide non-confidential information to researchers in lieu of confidential information. State agencies may, for example, encrypt identifiers before providing data to a researcher so that the researcher cannot identify individuals or employers. The agency could add subsequent years of data for the researcher using the same encryption so that the researcher can conduct longitudinal studies.

Paragraph (g) would provide that the confidentiality requirement does not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS) and that part 603 would not restrict or impose any condition on the transfer of any other information to the BLS under an agreement, or the BLS's disclosure or use of such information.

Transfers of information to the BLS would be excepted from the confidentiality requirement because the conditions under which they occur already satisfy the requirements of the confidentiality rule, and ETA does not wish to interfere with the BLS' existing agreements or the ability of the BLS to carry out its statistical programs. Specifically, safeguards, agreements, and payment of costs are already in place. The BLS applies strict safeguards to protect the confidentiality of information it receives. It also funds states for collection and disclosure of information. Finally, transfers of information to the BLS are governed by agreements that provide assurance that these safeguards will be followed.

Paragraph (h) would permit disclosure of UC information in response to a court order, or to an official with subpoena authority, as specified in § 603.7(b).

Paragraph (i) would permit disclosure of UC information as required by Federal law.

Section 603.6, Disclosures Required by Federal UC Law

This section lists disclosures required by Federal UC law. These requirements apply to state UC information as well as to information from the Federal UC and benefit programs of UCFE, UCX, TAA and ATAA (except for the confidential business information compiled by the states under the TAA program), DUA, and any Federal extended UC benefit program. These statutory requirements, by their terms, require disclosure of information maintained regarding these Federal programs, as well as state UC information, either because they specifically state that they include such Federal information or are written broadly enough to cover it. The utility of the information exchanges listed in this section would be impeded if this Federal information was not included in them.

Paragraph (a) sets forth the Department of Labor's interpretation of Section 303(a)(1) of the SSA as requiring disclosure of all information necessary for the proper administration of the UC program. This paragraph requires, for example, disclosure to the Internal Revenue Service for purposes of UC tax administration or to the Bureau of Citizenship and Immigration Services (formerly the Immigration and Naturalization Service) for purposes of verifying a claimant's immigration status. It also requires disclosure for purposes of interstate and cross-program offsets under Section 303(g), SSA.

Paragraph (b) covers other provisions of Federal UC law, with the exception of Section 303(f), concerning an IEVS, which is addressed in subpart C, that specifically require disclosure of certain state UC information and state-held Federal UC benefit information. These provisions include Sections—

- 303(a)(7), SSA, which requires state law to provide for making available, upon request, to any agency of the United States charged with the administration of public works, or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of UC, and statement of such recipient's rights to further compensation under state law.
- 303(c)(1), SSA, which requires each state to make its UC records available to the Railroad Retirement Board, and to furnish such copies of its UC records to the Railroad Retirement Board as the Board deems necessary for its purposes. This statutory provision requires a state to make "its records" available to the Railroad Retirement Board. Because Section 303 concerns state administration of the federal-state UC program, we interpret use of the term "records" in Section 303(c)(1) to limited to disclosure of UC records and not to include other records of the state.
- 303(d)(1), SSA, which requires each state UC agency, for purposes of determining an individual's eligibility benefits, or the amount of benefits, under a food stamp program established under the Food Stamp Act of 1977, to disclose, upon request, to officers and employees of the Department of Agriculture and state food stamp agencies, any of the following information contained in the records of such state agency—

(i) Wage information,

(ii) Whether an individual is receiving, has received, or has made application for, UC, and the amount of any such compensation being received, or to be received, by such individual,

(iii) The current (or most recent) home address of such individual, and

(iv) Whether an individual has refused an offer of employment and, if so, a description of the employment so offered and the terms, conditions, and rate of pay therefore.

• 303(e)(1), SSA, which requires each state UC agency to disclose, upon request, directly to officers or employees of any state or local child support enforcement agency, any wage information contained in the records of the state UC agency for purposes of establishing and collecting child support obligations from, and locating, individuals owing such obligations.

As explained in detail in UIPL 45–89 (55 FR 1886, January 19, 1990), Section 303(e)(1) limits required disclosure to use for purposes of establishing "child support obligations" being enforced by a child support enforcement agency. Accordingly, state UC agencies would not be required to disclose information for purposes related to support obligations for the custodial parent of the child receiving services from the child support enforcement agency. The Department intends to pursue legislation that would expand the purposes for which disclosure of wage information (as well as intercept of UC) is required under Section 303(e) to include enforcement of custodial parent support. In the meantime, however, State UC agencies are encouraged to disclose information related to such obligations under the optional disclosure permitted under § 603.5(e).

• 303(h), SSA, which requires each state UC agency to disclose quarterly, to the Secretary of Health and Human Services (HHS), wage information and claim information as required under Section 453(i)(1) of the SSA (establishing the National Directory of New Hires), contained in the records of such agency, for purposes of Subsections (i)(1), (i)(3), and (j) of Section 453, SSA (establishing the National Directory of New Hires and its uses for purposes of child support enforcement, Temporary Assistance to Needy Families (TANF), TANF research, administration of the earned income tax credit, and use by the Social Security Administration).

• 303(i), SSA, which requires each state UC agency to disclose, upon request, to officers or employees of the Department of Housing and Urban Development (HUD) and to representatives of a public housing agency, for purposes of determining an individual's eligibility for benefits, or the amount of benefits, under a housing assistance program of HUD, any of the following UC information contained in the records of such state agency about any individual applying for or participating in any housing assistance program administered by HUD who has signed a consent form approved by the Secretary of HUD—

(i) Wage information, and

(ii) Whether the individual is receiving, has received, or has made application for, UC, and the amount of any such compensation being received (or to be received) by such individual.

Section 303(i)(2) states that the "Secretary of Labor shall prescribe regulations governing how often and in what form information may be disclosed under paragraph (1)(A)" of Section 303(i). However, what is a useful frequency and format for such disclosure depends upon the needs of a particular requesting agency (in the case of Section 303(i), either HUD or a particular public housing agency) and the amount the agency is willing to reimburse the UC agency for providing the information. These will vary depending upon the circumstances of the particular requesting agency and the state or locality in which it operates. The preferences of the requesting agency may also change over time, along with changes in technology. Thus, in order to provide states and localities with needed flexibility, and to avoid drafting regulatory requirements that may need frequent revision, we have chosen not to regulate the frequency and format of disclosures at this time.

• 3304(a)(16), Federal Unemployment Tax Act (FUTA), which requires each state UC agency—

(i) To disclose, upon request, to any state or political subdivision thereof administering a TANF program funded under part A of Title IV of the SSA, wage information contained in the records of the state UC agency which is necessary (as determined by the Secretary of HHS in regulations), for purposes of determining an individual's eligibility for TANF assistance or the amount of TANF assistance; and

(ii) To furnish to the Secretary of HHS, in accordance with that Secretary's regulations at 45 CFR 303.108, wage information (as defined at 45 CFR 303.108(a)(2)) and UC information (as defined at 45 CFR 303.108(a)(3)) contained in the records of such agency for the purposes of the National Directory of New Hires established under Section 453(i) of the SSA.

Paragraph (c) would require each state law to contain provisions that are interpreted and applied consistently with this section.

Section 603.7, Subpoenas, Other Compulsory Process, and Disclosure to Officials With Subpoena Authority

This section sets forth the Department of Labor's long-standing position on state responses to subpoenas and other compulsory processes. With two exceptions, it would require the state or state UC agency to file and pursue a motion to quash, in the appropriate forum, when a subpoena or other compulsory process of a lawful authority, which requires the production of or appearance for testimony about confidential UC information, is served upon the state UC agency or the state. If such a motion were denied, after a hearing in the appropriate forum, confidential UC information may be disclosed, but only upon such terms as the court or other forum may order, including that the recipient protect the disclosed information and pay the state's or state UC agency's costs of disclosure.

The proposed exceptions are, first, where a court has previously issued a binding precedential decision that requires such disclosures and, second, when confidential UC information is requested by an official of state or Federal government, other than a clerk of court on behalf of a litigant, with authority to obtain the information by subpoena under state or Federal law. These proposed exceptions recognize that filing a motion to quash in these circumstances may indeed be futile and a waste of administrative resources. They would also facilitate state cooperation with law enforcement.

We believe that filing motions to quash subpoenas involving the disclosure of confidential UC information is an important means of avoiding unnecessary or unlawful disclosures, which might deter claimants from exercising their rights or employers from providing information. Where the exceptions apply, a state may still file such a motion if warranted, or may file a motion to require that the recipient protect the disclosed information or for reimbursement of costs. (As described in proposed § 603.8(b), seeking reimbursement in some manner would be required if grant funds are used to cover the costs of the disclosure.) If the state law is sufficiently rigorous concerning the release of confidential UC information, the courts may be less inclined to enforce subpoenas; so, states may wish to review their state laws in this regard. To conserve time and funds, states may wish to pursue a motion to quash by mail or by telephone if permitted by state law.

Section 603.8, Payment of Costs; Program Income

This section would set forth rules on the use of UC grant funds for disclosures of UC information, recovery of the state's and state UC agency's costs for disclosing information not made in the course of the administration of the UC

program, and use of program income. It would require payment of costs for any disclosures made for purposes other than administration of the UC program, with limited exceptions for requests involving incidental costs and some situations involving subpoenas. The statutory principle underlying these rules is that funds granted under Title III of the SSA for the administration of the state UC law may not be used for other purposes. This is required by the explicit statutory terms of Section 302(a) of the SSA (providing for payments to states for "proper and efficient administration" of state UC law), Section 303(a)(8) of the SSA (limiting expenditure of UC grants to amounts necessary for "proper and efficient administration" of state UC law), and Section 303(a)(9) of the SSA (requiring repayment to the Secretary Labor of any funds expended for purposes other than, or in amounts in excess of, those necessary for the proper administration of state UC law). It is a conformity requirement for approved state laws and is a substantial compliance requirement for the states and state UC agencies under Section 303(b) of the SSA. Thus, even if a required disclosure in Title III, SSA, or Section 3304(a)(16) does not explicitly require payment of costs, such payment is required by this section under authority of the sections of Title III, SSA, mentioned above.

Paragraph (a) of § 603.8 sets forth the general rule prohibiting the use of grant funds to pay any of the costs of making any disclosure except as provided in paragraph (b). It also specifies that grant funds may not be used to pay any of the costs of making any disclosures for non-UC purposes under § 603.5(e) (to a public official), § 603.5(f) (to an agent or contractor of a public official), § 603.5(g) (to BLS), § 603.6(b) (as required by Federal UC law for non-UC purposes), or § 603.22 (to HHS or a requesting agency for purposes of an IEVS)).

Paragraph (b) sets out the exceptions when use of grant funds would be permitted to pay the costs of disclosures. Grant funds may be used to pay the costs of disclosures made for purposes of administration of the UC program (which may include some disclosures under §§ 603.5(a) (public domain information), (c) (to an individual or employer), or (d) (on the basis of informed consent)). Grant funds may also be used to pay the costs of disclosures made in response to requests involving only incidental staff time and no more than nominal processing costs, and for disclosures in response to subpoenas under § 603.7(b)(1) (when a court decision requires disclosure) if a court has denied recovery of costs, or to officials with subpoena authority under § 603.7(b)(2) if the state UC agency has attempted but not been successful in obtaining reimbursement of costs.

Paragraph (c) sets out how costs would have to be calculated. Costs would be required to be calculated in accordance with the cost principles and administrative requirements of 29 CFR part 97 and Office of Management and Budget Circular No. A–87 (Revised). Costs would be required to be charged to and paid by the recipient and would include any initial start-up costs incurred by the state UC agency, such as computer reprogramming required to respond to a request, and the costs of implementing safeguards and agreements required by §§ 603.9 and 603.10. (Start-up costs would not include the costs to the state UC agency of obtaining, compiling, or maintaining information for its own purposes.) Postage or other delivery costs incurred in making any disclosure would be part of the costs of making the disclosure. Penalty mail, as defined in 39 U.S.C. 3201(1), must not be used to transmit information being disclosed, except when the disclosure is made for purposes of administration of the UC program. By statute (Sections 453(e)(2) and 453(g) of the SSA), the Secretary of HHS has the authority to determine what constitutes a reasonable amount for the reimbursement for disclosures under Sections 303(h), SSA, and 3304(a)(16)(B), FUTA.

Paragraph (d) would require the payment of costs, calculated in accordance with paragraph (c), to be paid by and collected from the recipient of the information either in advance or by way of reimbursement. If the recipient is not a public official, such costs, except for good reason, would be required to be paid and collected in advance. Payment in advance would mean full payment of costs before or at the time the disclosed information is given in hand or sent to the recipient. ETA's intention is that the "good reason" exception generally be associated with disclosures involving minimal costs.

The requirement for payment of costs would be met when a state UC agency has in place a reciprocal data-sharing agreement or arrangement with another agency or entity. "Reciprocal" means that the relative benefits received by each party to the agreement or arrangement are approximately equal.

Paragraph (e) would provide that reimbursed costs and any funds generated by the disclosure of information are program income and may be used only as permitted by 29 CFR 97.25(g) (on program income). Program income may not be used to benefit a state's general fund or another program.

Section 603.9, Safeguards for Disclosed Information

This proposed section sets forth the safeguards that states and state UC agencies would have to require of recipients who obtain confidential UC information under: §§ 603.5(d)(2) (disclosure to a third party on the basis of informed consent); (e) (disclosure to a public official), except as provided in paragraph (d) of this section; (f) (disclosure to an agent or contractor of a public official); § 603.6(b)(1) through (4), (6), and (7)(i) (disclosures required by Federal UC law, except for disclosures to HHS under Sections 303(h), SSA, and 3304(a)(16)(B), FUTA); or § 603.22 (to a requesting agency for purposes of an IEVS). These safeguards are similar to those in present part 603 that currently apply to disclosures under an IEVS but have been simplified to provide flexibility to states. They would preclude the unauthorized use, access, and redisclosure of the information.

Not all the disclosure requirements of Title III, SSA, referred to above explicitly require safeguards, but Section 303(a)(1), SSA, provides a basis for the requirement. Safeguards protect against the misuse or improper redisclosure of disclosed information and, therefore, like the confidentiality requirement itself, maintain claimant and employer confidence in the UC system and their willingness to participate and cooperate in its administration. This participation and cooperation is essential to the system's effective administration. Requiring safeguards is therefore a "method of administration" reasonably calculated to insure full payment of UC when due.

Paragraph (a) sets forth the general rules, which would require the state or state UC agency to require that the recipient of disclosed information safeguard the information against unauthorized access or redisclosure as provided in paragraphs (b) and (c), and that the recipient be subject to penalties provided by the state law for unauthorized disclosure.

Paragraph (b) sets forth safeguards that the state or state UC agency would have to require of recipients.

Paragraph (b)(1)(i) would require states or state UC agencies to require recipients to use the disclosed information only for purposes authorized by law and consistently with an agreement that meets the requirements of § 603.10.

Paragraph (b)(1)(ii) would require the recipient to store the disclosed information in a place physically secure from access by unauthorized persons.

Paragraph (b)(1)(iii) would require the recipient to store or process disclosed information maintained in electronic format, such as magnetic tapes or discs, in such a way that unauthorized persons cannot obtain the information by any means.

Paragraphs (b)(1)(ii) and (iii) can be met by, among other things, placing paper files in a locked cabinet or room, and in the case of information maintained electronically, using electronic passwords or computer encoding to block access by unauthorized persons.

Paragraph (b)(1)(iv) provides for precautions to ensure that only authorized personnel are given access to disclosed information stored in computer systems.

Paragraph (b)(1)(v) would require each recipient agency to give specified instructions to all personnel having access to the disclosed information and to sign an acknowledgment that all such personnel have been so instructed and that they will adhere to the state's or state UC agency's confidentiality requirements and procedures which are consistent with subpart B and the agreement required by § 603.10, and will report any infractions to the state UC agency.

Paragraph (b)(1)(vi) would require the recipient to dispose of information disclosed or obtained, and any copies thereof made by the recipient agency, entity, or contractor, after the purpose for which the information is disclosed is served, except for disclosed information possessed by any court. Disposal means return of the information to the disclosing state or state UC agency or destruction of the information, as directed by the state or state UC agency. Disposal includes deletion of personal identifiers by the state or state UC agency in lieu of destruction. The state or state UC agency would set appropriate time limits on retention on a case-by-case basis in order to prohibit permanent records storage.

Paragraph (b)(1)(vii) would require states to maintain a tracking system sufficient to allow an audit of compliance with the requirements of this subpart. States would be free to specify the details for this disclosure tracking system. Tracking by states is necessary to ensure that recipients of disclosed information are complying with the required safeguards. This responsibility may not be handed over to the recipient. Where recipients would be required to pay for the costs of making a disclosure, the costs of tracking should be reflected in the amount charged to the recipient. As a result, tracking, like other provisions in this proposed rule, should not increase costs for state UC agencies.

Paragraph (b)(2) would specifically require the state to conduct, in the case of optional disclosures to entities on the basis of informed consent (§ 603.5(d)(2)), a periodic audit of sample transactions to assure that the entity receiving information has on file a written release authorizing each access. The audit would be required to ensure that the information is not being used for any unauthorized purpose. This provision would also require that all employees of entities receiving access to information pursuant to § 603.5(d)(2) be subject to the same confidentiality requirements, and state criminal penalties for violation of those requirements, as are employees of the state UC agency.

The safeguards in proposed paragraph (b) do not address specific or new technologies used in storing and sharing confidential UC information. Nevertheless, these safeguards would be applicable to disclosures of confidential UC information no matter what medium of storing and sharing the information is used. ETA encourages efficient use of technologies in storage, retention, and, where appropriate, sharing of information. Proposed paragraph (b) would not restrict the types of media that may be used to transmit confidential UC information as long as the safeguards are met.

Paragraph (c)(1) would permit a state or state UC agency to authorize any recipient of confidential information under paragraph (a) (which applies to disclosure to a public official, except as provided in paragraph (d) of this section, to an agent or contractor of a public official, and to any other entity on the basis of informed consent) to redisclose information only in eight situations. These are redisclosure:

- To the individual or employer who is the subject of the information (paragraph (c)(1)(i)).
- To attorney or other duly authorized agent representing the individual or employer (paragraph (c)(1)(ii)).
- In a civil or criminal proceedings for or on behalf of a recipient agency or entity (paragraph (c)(1)(iii)).
- As provided in § 603.7, in response to a subpoena (paragraph (c)(1)(iv)).
- To agents and contractors of public officials (paragraph (c)(1)(v)). Under this provision, the recipient public official would remain responsible for the uses of the confidential UC information by the agent or contractor.
- By one public official to another public official (paragraph (c)(1)(vi)). This provision would take into account situations in which public officials in different agencies or in different states need to share confidential UC information with each other in the course of administering a public program.
- Of wage information from state and local child support enforcement agencies to agents under contract with such agencies for purposes of carrying out child support enforcement, consistent with Section 303(e)(5) of the SSA (paragraph (c)(1)(vii)) and state law. Though proposed paragraph (c)(1)(vii) covers only wage information, redisclosure of other confidential UC information between a state or local child support enforcement agency and its contractor or agent would be permitted by paragraph (c)(1)(v).
- By an entity that has obtained confidential UC information on the basis of informed consent, when authorized by the state and by a written release from the individual or employer to whom the information pertains that meets the requirements of proposed § 603.5(d)(2) (paragraph (c)12(1)(viii)).

The redisclosure provisions would allow sharing of confidential UC information by a public official to an individual administering the WIA who is not a public official if the individual is an agent or contractor of a public official, or on the basis of informed consent.

Paragraph (c)(2) would require that information redisclosed under paragraphs (c)(1)(v) and (vi) be subject to the safeguards in paragraph (b).

Paragraph (d) would provide that the safeguards in this section, including the limitations on redisclosure, do not apply to disclosures of UC information to a Federal agency where the Department has published a notice in the **Federal Register** that the Federal agency has appropriate safeguards, and limitations on redisclosure, to protect the confidentiality of the disclosed information consistent with Section 303(a)(1), SSA. The reason for this exception is to avoid unnecessary duplication of requirements, or the creation of inconsistent requirements, concerning safeguards and restrictions on redisclosure, for Federal agencies that already follow strong safeguards for protecting the confidentiality of information. This exception is limited to Federal agencies because the Department, through its regular contacts with such agencies, is in a position to easily determine whether the applicable

Federal laws and regulations provide safeguards and limitations consistent with Section 303(a)(1), SSA. Two disclosures for which the Department has already determined that a Federal agency has in place adequate alternative safeguards include disclosures to the Internal Revenue Service (IRS) for purposes of administering the Health Coverage Tax Credit (HCTC), and disclosures of wage and claim information to HHS for purposes of the National Directory of New Hires.

The HCTC, established by the Trade Act of 2002 (Pub. L. 107–210), is a partial Federal tax credit toward the purchase of qualified health insurance for eligible individuals and their families. Eligible individuals include workers covered by the TAA program who are either receiving Trade Readjustment Allowances (TRA) or who would be eligible for TRA but for not having exhausted UC and eligible participants in the ATAA program. The IRS, which administers the HCTC, needs information from state workforce agencies (SWAs) about who is eligible for TRA, or would be but for not having exhausted UC, as well as information about who is participating in the ATAA program, to determine eligibility for the tax credit. UC information needed by the IRS would fall within the protection of this rule, and TAA and ATAA information would be subject under state law to the same confidentiality protections as contained in this rule.

However, Section 6103 of the Internal Revenue Code and IRS regulations on the confidentiality of tax return information (26 CFR 301.6103(a)–1 *et seq.*) are sufficient to protect the confidentiality of this information consistent with Section 303(a)(1), SSA. (Once this information about ATAA, TRA, and UC eligibility is submitted to the IRS or its agents, it becomes protected tax return information.) Requiring the IRS to follow the requirements of this regulation in addition to Section 6103 and IRS regulatory requirements would be unnecessarily burdensome and may create conflicting obligations for that agency. Accordingly, the requirements of § 603.9 of this rule, concerning safeguards, do not apply to disclosures to the IRS for purposes of administering the HCTC. The Department has determined that the IRS has appropriate alternative safeguards, and limitations on redisclosure, to protect the confidentiality of the disclosed information consistent with Section 303(a)(1), SSA.

Similarly, wage and claim information disclosed to HHS for purposes of the National Directory of New Hires is protected by a "security plan" of HHS which the Department of Labor has determined provides safeguards adequate to meet the requirement of Section 303(a)(1) to maintain confidentiality. Further, laws governing information in the National Directory of New Hires impose strict controls on redisclosure and disposal of that information. *See, e.g.*, 42 U.S.C. 653(i), (j), (l), and (m). Accordingly, the requirements of § 603.9 of this rule, concerning safeguards, do not apply disclosures to the HHS for purposes of the National Directory of New Hires. The Department has determined that HHS has appropriate alternative safeguards, and limitations on redisclosure, to protect the confidentiality of the disclosed information consistent with Section 303(a)(1), SSA.

Section 603.10, Agreements

This section sets out the proposed requirements concerning data-sharing agreements with parties obtaining confidential UC information. The required terms and conditions are similar to those contained in the existing part 603 but have been simplified to provide state flexibility.

Paragraph (a)(1) would require a state or state UC agency to enter into a written, enforceable agreement with any agency or entity requesting disclosure of UC information under proposed § 603.5(d)(2) (disclosure to a third party on the basis of informed consent); (e) (disclosure of information to a public official), except as provided in paragraph (d) of this section; (f) (disclosure to an agent or contractor of a public official); § 603.6(b)(1) through (4); (6); and (7)(i) (where disclosure is required by Federal UC law, except to HHS under Sections 303(h), SSA, and 3304(a)(16)(B), FUTA); and § 603.22 (to a requesting agency for purposes of an IEVS).

Paragraph (a)(2) requires, for disclosure to an agent or contractor of a public official, that the state or state UC agency enter into a written, enforceable agreement (whether on paper or electronic) with the public official on whose behalf of the agent or contractor will obtain information, which requires the public official to ensure that the agent or contractor complies with the safeguards of § 603.9. The purpose of this provision would be to have the public official with responsibility for the public purpose that is being carried out by the use of the disclosed information, assume responsibility for safeguarding the confidentiality of the data.

Paragraph (b)(1) sets out the terms and conditions that would be required to be included in all agreements, and also provides that the terms and conditions of any agreement need not be limited to those specifically required. Required to be included would be:

- A description of the specific information to be furnished and the purposes for which the information is sought;
- A statement that those who request or receive information under the agreement will be limited to those with a need to access it for purposes listed in the agreement;
- The methods and timing of requests for information, including the format to be used;
- Provision for paying the state or state UC agency for any costs of furnishing information, as required by § 603.8 (on costs);
- Provision for safeguarding the information disclosed, as required by § 603.9 (on safeguards); and
- Provision for on-site inspections of the agency, entity, or contractor to assure that the requirements of the state's law and the agreement or contract are being met.

Paragraph (b)(2) would require that, for disclosures under § 603.5(d)(2) (to a third party on the basis of informed consent), the agreement required by paragraph (a) of this section must assure that the information will be accessed by only those entities with authorization under the individual's or employer's release, and that it may be used only for the specific purposes authorized in that release. This safeguard is included in UIPL 23–96 (Disclosure of Confidential Employment Information to Private Entities), which will be superseded by a final rule.

A single, comprehensive agreement would satisfy the requirement for an agreement in cases where repeated disclosures to the same entity occur.

Paragraph (c) discusses enforcement and breach of agreements.

Paragraph (c)(1) would prescribe the steps to be taken in case of any breach of an agreement, including failure to timely pay for the costs of any disclosure. First, the agreement would have to be suspended, and any further disclosure would have to be prohibited, until the state or state UC agency is satisfied that corrective action has been taken and that no further breach of the agreement will occur. Second, in the absence of prompt and satisfactory corrective action, the agreement would have to be cancelled, and the party would have to surrender all information obtained under the agreement and any

other information relevant to the agreement.

It is necessary to the integrity of the confidentiality requirement that any breach of an agreement, whatever its importance may seem in the abstract, be promptly addressed and corrected, and, in the absence of prompt and satisfactory correction, that the agreement be cancelled and the state or state UC agency retrieve and secure all disclosed information.

Paragraph (c)(2) would require that the state and state UC agency utilize all available legal enforcement tools. Thus, in addition to the actions required to be taken in accordance with paragraph (c)(1), the state or state UC agency would be required to undertake any other action under the agreement, or under any law of the state or of the United States, to enforce the agreement and secure satisfactory corrective action or surrender of information. Other remedial actions the state would be required to undertake include seeking damages, penalties, and restitution for any charges to granted funds, and recompense for all costs incurred by the state or state UC agency in pursuing legal action for the breach of the agreement and enforcement as required by paragraph (c).

Paragraph (d) would except from the requirements of this section, concerning agreements and their enforcement, disclosures of UC information to a Federal agency that the Department has determined to have in place adequate safeguards to satisfy Section 303(a)(1), SSA's requirement of maintaining confidentiality, and to have an appropriate method of paying or reimbursing the state UC agency (which may involve a reciprocal cost arrangement) for costs involved in such disclosures. For the reasons described in the discussion of § 603.9(d) (concerning safeguards), the Department has determined or will determine that in certain cases Federal agencies already have in place safeguards adequate to satisfy confidentiality concerns.

The Department believes that for these disclosures, when the relevant Federal agency also has in place a method determined adequate by the Department of Labor to reimburse state UC agencies for the costs associated with disclosure, the state UC agencies should be excepted from the requirement to enter into written agreements. The reasons are several. First, the safeguards that govern information disclosed to Federal agencies are already codified in statute, regulation, or the Federal agency's written operating policies and procedures, so there is no need to memorialize them by agreement. Further, most disclosures to Federal agencies are documented in the sense that they are either explicitly or implicitly required by statute or are the subject of a memorandum of understanding between the Department of Labor and the recipient Federal agency. Finally, for Federal agencies that already have a method in place that is determined adequate by the Department of Labor to reimburse state UC agencies for the costs associated with disclosure, there is no need to negotiate cost reimbursement by agreement.

Two agencies that the Department has determined to already have in place appropriate alternative safeguards (as indicated in the discussion of § 603.9, safeguards) and to have appropriate methods in place to reimburse state UC agencies for costs associated with disclosure are the IRS, for purposes of administering the HCTC, and HHS, for purposes of the National Directory of New Hires. Thus, the requirements of this section, concerning agreements and their enforcement, do not apply to the IRS, for purposes of administering the HCTC, or to HHS, for purposes of the National Directory of New Hires.

Section 603.11, Notification of Claimants and Employers

This section would require state UC agencies to notify claimants and employers how confidential UC information about them may be requested and utilized. This section is derived from present § 603.4 but, unlike the present § 603.4, would be applicable to employers as well as claimants. State privacy law may require more detailed notification.

Section 603.4 of the present part 603 implements the notification requirement applicable to the IEVS of Section 1137(a)(6) of the SSA. This section restates the notification requirement of Section 1137(a)(6), SSA, as a general requirement of Section 303(a)(1) of the SSA. Notifying claimants and employers what use may be made of UC information is necessary to maintaining their confidence in the federal-state UC system, which is critical to its proper and efficient administration.

Section 603.12, Enforcement

For a state to receive Federal grants to fund UC administration, and for employers in the state to receive credit against the Federal unemployment tax, state law must conform and its practices must substantially comply with the requirements of Federal UC law. Conformity means that a state's law contains provisions required by Federal UC law, and that those provisions are interpreted consistently with Federal UC law. Substantial compliance means that a state's administration of its law is substantially consistent with Federal UC law.

This section sets forth how the Department of Labor would determine and enforce conformity and substantial compliance with the confidentiality and disclosure requirements of Title III of the SSA and Section 3304(a)(16), FUTA, as provided in subparts B and C of this regulation. The procedures in 20 CFR 601.5 would apply, meaning that if any issue involving conformity and substantial compliance arose, the Department would generally first hold informal discussions with state officials. Should informal discussions fail to resolve the issue, the Department would offer the state UC agency an opportunity for a hearing. If the Secretary of Labor were to find, after reasonable notice and opportunity for a hearing, a failure to conform or substantially comply with the confidentiality and disclosure requirements of Title III, SSA, as provided in subparts B and C, the Secretary would notify the Governor of the state that grants to fund state administration of the UC program would be withheld. For failure to conform or substantially comply with the disclosure requirements of Section 3304(a)(16), FUTA, as provided in subpart B, the Secretary would make no certification under FUTA to the Secretary of the Treasury that employers in the state are eligible to receive credit against the Federal unemployment tax.

All the confidentiality and disclosure requirements set forth in this proposed regulation are intended to be both conformity and substantial compliance requirements, even though some of the disclosure provisions in Title III, SSA, mention only substantial compliance and do not explicitly require that they be provided for in state law (the definition of a conformity requirement). However, since only state law can compel the state UC agency to hold information confidential or to disclose information, a conformity mandate is inherent in these provisions. Additionally, since these provisions are exceptions to Section 303(a)(1), SSA's confidentiality requirement, which is itself a conformity requirement, conformity is implied, since an exception to state law is needed to permit or compel disclosure. We note that, as a practical matter, the effect of a state's nonconformity or lack of substantial compliance under Title III, SSA, is the same: loss to the state of Federal UC administrative grants.

Two provisions of Section 303, SSA, mention neither conformity nor substantial compliance (Sections 303(c) and 303(f)). Section 303(c) (requiring, among other things, disclosures to the Railroad Retirement Board) uses terminology of strict compliance, though we interpret it to require substantial compliance to be in keeping with our interpretation of the rest of the requirements in Title III, SSA. Section 303(f) (requiring disclosures for IEVS purposes) is completely silent on enforcement. However, that section would be a meaningless requirement if enforcement authority did not exist. Further, the structure of Title III, SSA, which gives the Secretary of Labor authority to distribute grant funds to states who meet the requirements of Title III, SSA, indicates that the Secretary of Labor has authority to implement and enforce its provisions.

Conformity and substantial compliance with proposed part 603 may require amendments to state law (including regulations) or to state UC agency policy or practice. Each state would need to review its law and data-sharing agreements to ensure that they conform and substantially comply with the confidentiality and disclosure requirements of Title III, SSA, and Section 3304(a)(16), FUTA, as provided in this proposed rule.

Subpart C—Income and Eligibility Verification System (IEVS)

Subpart C would implement Section 303(f) of the SSA. That section requires states to have an IEVS which meets the requirements of Section 1137 of the SSA, under which information is requested and exchanged for the purpose of verifying eligibility for, and the amount of, benefits available under several federally assisted programs including the federal-state UC program. Because the purpose of these regulations is limited to addressing confidentiality and disclosure of UC information by state government agencies, subpart C includes only those portions of the present part 603 IEVS regulations which address that subject. Consequently, subpart C merely notes, but does not implement, the requirement of Section 1137 SSA, and the present part 603 concerning claimant provision of Social Security account numbers and other requirements of Section 1137, SSA. Nevertheless, those requirements are statutory and states must still comply with them.

Section 303(f), SSA, is a mandatory disclosure requirement like the requirements addressed in § 603.6 of subpart B. In addition to requiring disclosure, however, Section 303(f) requires state UC agencies to obtain information from other agencies. In order to clarify what information state UC agencies must obtain from other agencies and in what circumstances, this proposed rule addresses Section 303(f), the IEVS requirements, in a separate subpart. Enforcement of subpart C, however, would occur under § 603.12 of subpart B.

Section 603.20, Purpose and Scope

This section sets forth the purpose and scope of proposed subpart C. It also notes the statutory requirements (under Section 1137, SSA) that states have wage record systems and that claimants furnish statements regarding their Social Security account numbers (as discussed above), and, under the 1988 amendments to Section 1137, SSA, nationality or immigration status.

This subpart applies only to state UC agencies, as they, not states, are required to disclose information referred to in subpart C.

Section 603.21, Definition

This section defines "requesting agency," in accordance with Section 1137 SSA, to mean an agency that administers Temporary Assistance to Needy Families, Medicaid, Food Stamps, or other SSA programs under Titles I, II, X, XIV, or XVI, SSA.

Section 603.22, Disclosure of Information

This section sets forth the basic requirement of the subpart that each state UC agency must disclose wage and claim information to requesting agencies and that the state UC agency must adhere to standardized formats established by the Secretary of HHS and defined in 42 CFR 435.960. This section would require state UC agencies to disclose only wage and claim information contained in the agency's UC records.

Section 603.23, Crossmatch of Wage and Benefit Information

This section would require that states UC agencies obtain information from the Social Security Administration and any requesting agency that is needed in verifying eligibility for, and the amount of, compensation payable under the state UC law. It would also require state UC agencies to crossmatch quarterly wage information with UC payment information to the extent such information is likely, as determined by the Secretary of Labor, to be productive in identifying ineligibility for benefits and preventing or discovering incorrect payments.

Executive Order 12866

This proposed rule is a "significant regulatory action" within the meaning of Executive Order 12866 because it meets the criteria of Section 3(f)(4) of that Order in that it raises novel or legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, the proposed rule has been submitted to, and reviewed by, the Office of Management and Budget (OMB).

However, the proposed rule is not "economically significant" because it would not have an annual effect on the economy of $100 million or more. We have also determined that the proposed rule would have no adverse material impact upon the economy and that it would not materially alter the budgeting impact of entitlement, grants, user fees or loan programs, or the rights and obligations of recipients thereof.

Further, we have evaluated the proposed rule and found it consistent with the regulatory philosophy and principles set forth in Executive Order 12866, which governs agency rulemaking. Although the proposed rule would impact states and state UC agencies, it would not adversely affect them in a material way. The proposed rule would protect state UC agencies from becoming clearinghouses of confidential UC information and preserve UC grant funds for program purposes. In addition, the proposed rule would maintain state flexibility in deciding whether to permit certain disclosures of confidential UC information for purposes other than the administration of the UC program so long as certain safeguards are followed.

Executive Order 13132

We have reviewed this proposed rule in accordance with Executive Order 13132 and have determined that it may have federalism implications. We intend to consult with organizations representing state elected officials about this rule in the upcoming weeks. We held a previous federalism consultation with organizations representing state elected officials at the Department of Labor on October 19, 2000, during an earlier stage in this rulemaking process. These organizations expressed no concerns at that time, or in the following months. However, we invite these organizations and states to submit comments on this proposed rule. Twenty-five states submitted comments on the 1992 proposed regulation. We believe this proposed rule addresses the concerns expressed in those comments.

Executive Order 12988

We drafted and reviewed this proposed regulation in accordance with Executive Order 12988, Civil Justice Reform, and it would not unduly burden the Federal court system. The proposed rule was written to minimize litigation and provide a clear legal standard for affected conduct, and was reviewed carefully to eliminate drafting errors and ambiguities.

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

This proposed rule was reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. We have determined that this proposed rule does not include any Federal mandate that may result in increased expenditures by state, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement.

Paperwork Reduction Act

The following sections of this proposed rule contain information collection requirements or would revise information collection requirements in current 20 CFR part 603: §§ 603.5, 603.6, 603.7, 603.8, 603.9, 603.10, 603.11, 603.22, and 603.23. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted the information collection requirements in this proposed rule to the OMB for approval under OMB control number 1205–0238.

The annual burden associated with this proposed rule for all states combined is estimated at approximately 25,810 hours.

We invite public comment on all of the information collection requirements in this proposed rule. These comments should be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Department of Labor, Employment and Training Administration, 725 17th Street, NW., Room 10235, Washington, DC 20503.

Regulatory Flexibility Act

This proposed rule would not have a "significant economic impact on a substantial number of small entities." The proposed rule affects states and state agencies, which are not within the definition of "small entity" under 5 U.S.C. 601(6). Under 5 U.S.C. 605(b), the Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Congressional Review Act

This proposed rule is not a "major rule" as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule would not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Effect on Family Life

We certify that this proposed rule was assessed in accordance with Public Law 105–277, 112 Stat. 2681, and that the proposed rule would not adversely affect the well-being of the nation's families.

List of Subjects in 20 CFR Part 603

Employment and Training Administration, Labor, Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at No. 17.225, Unemployment Insurance.

Signed in Washington, DC on August 5, 2004.

Emily Stover DeRocco,

Assistant Secretary of Labor, Employment and Training Administration.

Words of Issuance

For the reasons set forth in the preamble, part 603 of Title 20, Code of Federal Regulations is proposed to be revised as set forth below:

PART 603—FEDERAL-STATE UNEMPLOYMENT COMPENSATION (UC) PROGRAM; CONFIDENTIALITY AND DISCLOSURE OF STATE UC INFORMATION

Sec.

Authority: 42 U.S.C. 1302(a); Secretary's Order No. 4–75 (40 FR 18515) and Secretary's Order No. 14–75 (November 12, 1975).

Subpart A—In General

§ 603.1 What is the purpose and scope of this part?

The purpose of this part is to implement the requirements of Federal UC law concerning confidentiality and disclosure of UC information. This part applies to states and state UC agencies, as defined in § 603.2(f) and (g).

§ 603.2 What definitions apply to this part?

For the purposes of this part:

(a)(1) *Claim information* means information about:

(i) Whether an individual is receiving, has received, or has applied for UC;

(ii) The amount of compensation the individual is receiving or is entitled to receive; and

(iii) The individual's current (or most recent) home address.

(2) For purposes of subpart C (IEVS), claim information also includes:

(i) Whether the individual has refused an offer of work and, if so, a description of the job offered including the terms, conditions, and rate of pay; and

(ii) Any other information contained in the records of the state UC agency that is needed by the requesting agency to verify eligibility for, and the amount of, benefits.

(b) *Confidential UC information* and *confidential information* mean any UC information, as defined in paragraph (j) of this section, required to be kept confidential under § 603.4.

(c) *Public domain information* means—

(1) Information about the organization of the state and the state UC agency and appellate authorities, including the names and positions of officials and employees thereof;

(2) Information about the state UC law (and applicable Federal law) provisions, rules, regulations, and interpretations thereof, including statements of general policy and interpretations of general applicability, appeals records and decisions, and precedential determinations on coverage of employers, employment, and wages; and

(3) Any agreement of whatever kind or nature, including interstate arrangements and reciprocal agreements and any agreement with the Department of Labor or the Secretary, relating to the administration of the state UC law.

(d) *Public official* means an official, agency, or public entity within the executive branch of Federal, state, or local government who (or which) has responsibility for administering or enforcing a law, or a legislator in the Federal, state, or local government with oversight responsibility for the UC program.

(e) *Secretary* and *Secretary of Labor* mean the cabinet officer heading the United States Department of Labor, or his or her designee.

(f) *State* means a state of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.

(g) *State UC agency* means an agency charged with the administration of the state UC law.

(h) *State UC law* means the law of a state approved under Section 3304(a) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)).

(i) *Unemployment compensation* (UC) means cash benefits to individuals with respect to their unemployment.

(j) *UC information* and *state UC information* means information in the records of a state or state UC agency that pertains to the administration of the state UC law. This term includes those state wage reports collected under the Income and Eligibility Verification System (IEVS) (Section 1137 of the Social Security Act (SSA)) that are obtained by the state UC agency for determining UC monetary eligibility or are downloaded to the state UC agency's files as a result of a crossmatch but does not otherwise include those wage reports. It does not include information in a state's Directory of New Hires, but does include any such information that has been disclosed to the state UC agency for use in the UC program. It also does not include the personnel or fiscal information of a state UC agency.

(k) *Wage information* means information in the records of a state UC agency (and, for purposes of § 603.23 (IEVS)), information reported under provisions of state law which fulfill the requirements of Section 1137 of the SSA) about the—

(1) Wages paid to an individual,

(2) Social security account number (or numbers, if more than one) of such individual, and

(3) Name, address, state, and the Federal employer identification number of the employer who paid such wages to such individual.

Subpart B—Confidentiality and Disclosure Requirements

§ 603.3 What is the purpose and scope of this subpart?

This subpart implements the basic confidentiality requirement derived from Section 303(a)(1), SSA, and the disclosure requirements of Sections 303(a)(7), (c)(1), (d), (e), (h), and (i), Social Security Act (SSA), and Section 3304(a)(16), Federal Unemployment Tax Act (FUTA). This subpart also establishes uniform minimum requirements for the payment of costs, safeguards, and data-sharing agreements when UC information is disclosed, and for conformity and substantial compliance with this proposed rule. This subpart applies to states and state UC agencies, as defined in § 603.2(f) and (g).

§ 603.4 What is the confidentiality requirement of Federal UC law?

(a) *Statute.* Section 303(a)(1) of the SSA (42 U.S.C. 503(a)(1)) provides that, for the purposes of certification of payment of granted funds to a state under Section 302(a) (42 U.S.C. 502(a)), state law must include provision for "(s)uch methods of administration * * * as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due * * *".

(b) *Interpretation.* The Department of Labor interprets Section 303(a)(1), SSA, to mean that "methods of administration" that are reasonably calculated to insure the full payment of UC when due must include provision for maintaining the confidentiality of any UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information, except as provided in this part.

(c) *Application.* Each state law must contain provisions that are interpreted and applied consistently with the interpretation at paragraph (b) of this section and with this subpart, and must provide penalties for any disclosure of confidential UC information that is inconsistent with any provision of this subpart.

§ 603.5 What are the exceptions to the confidentiality requirement?

The following are exceptions to the confidentiality requirement. Disclosure is permissible under exceptions at paragraphs (a) through (g) of this section only if authorized by state law and if such disclosure does not interfere with the efficient administration of the state UC law. Disclosure is permissible under exceptions at paragraphs (h) and (i) of this section without such restrictions.

(a) *Public domain information.* The confidentiality requirement of § 603.4 does not apply to public domain information, as defined at § 603.2(c).

(b) *Administration of the UC program.* The confidentiality requirement of § 603.4 does not apply when disclosure is necessary for the proper administration of the UC program.

(c) *Individual or employer.* Disclosure of UC information about an individual to that individual, or of UC information about an employer disclosed to that employer is permissible.

(d) *Informed consent.* Disclosure of UC information on the basis of informed consent is permissible in the following circumstances—

(1) Agent or attorney—to an agent or attorney of an individual, of information that pertains to that individual, or to an agent or attorney of an employer, of information that pertains to that employer, if —

(i) The agent or attorney presents a written release from the individual or employer being represented, or

(ii) If a written release is impossible or impracticable to obtain, the agent or attorney presents such other form of consent as is permitted by the state UC agency in accordance with state law;

(2) *Third party*—to a third party only if that entity obtains a written release from the individual or employer to whom the information pertains.

(i) The release must be signed and must include a statement—

(A) Specifically identifying the information that is to be disclosed;

(B) That state government files will be accessed to obtain that information;

(C) Of the specific purpose or purposes for which the information is sought and a statement that information

obtained under the release will only be used for that purpose or purposes; and

(D) Indicating all the parties who may receive the information released.

(ii) The purpose specified in the release must be limited to—

(A) Providing a service or benefit to the individual signing the release that such individual expects to receive as a result of signing the release; or

(B) Carrying out administration or evaluation of a public program to which the release pertains.

(Note to paragraph (d)(2): The Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign), Public Law 106–229, may apply where a party wishes to effectuate electronically an informed consent release (paragraph(d)(2) of this section) or a disclosure agreement (§ 603.10(a)) with an entity that uses informed consent releases. E-Sign, among other things, sets forth the circumstances under which electronic signatures, contracts, and other records relating to such transactions (in lieu of paper documents) are legally binding. Thus, an electronic communication may suffice under E-Sign to establish a legally binding contract. The states will need to consider E-Sign's application to these informed consent releases and disclosure agreements. In particular, a state must, to conform and substantially comply with this part, assure that these informed consent releases and disclosure agreements are legally enforceable. If an informed consent release or disclosure agreement is to be effectuated electronically, the state must determine whether E-Sign applies to that transaction, and, if so, make certain that the transaction satisfies the conditions imposed by E-Sign. The state must also make certain that the electronic transaction complies with every other condition necessary to make it legally enforceable.)

(e) *Public official.* Disclosure of UC information to a public official for use in the performance of his or her official duties is permissible. "Performance of official duties" means administration or enforcement of law, or, in the case of a state or Federal legislative branch, oversight of UC law.

(f) *Agent or contractor of public official.* Disclosure of UC information to an agent or contractor of a public official to whom disclosure is permissible under paragraph (e) of this section.

(g) *Bureau of Labor Statistics.* The confidentiality requirement does not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS). Further, this part does not restrict or impose any condition on the transfer of any other information to the BLS under an agreement, or the BLS's disclosure or use of such information.

(h) *Court order; official with subpoena authority.* Disclosure of UC information in response to a court order or to an official with subpoena authority is permissible as specified in § 603.7(b).

(i) *As required by Federal law.* Disclosure as required by Federal law is permissible.

§ 603.6 What disclosures are required by Federal UC law?

(a) The Department of Labor interprets Section 303(a)(1) of the SSA as requiring disclosure of all information necessary for the proper administration of the UC program.

(b) In addition to Section 303(f), SSA (concerning an IEVS), which is addressed in subpart C, the following provisions of Federal UC law also specifically require disclosure of state UC information and state-held information pertaining to the Federal UC and benefit programs of UCFE, UCX, TAA (except for confidential business information collected by states), DUA, and any Federal UC benefit extension program:

(1) Section 303(a)(7), SSA, requires state law to provide for making available, upon request, to any agency of the United States charged with the administration of public works or assistance through public employment, disclosure of the following information with respect to each recipient of UC—

(i) Name;

(ii) Address;

(iii) Ordinary occupation;

(iv) Employment status; and

(v) A statement of such recipient's rights to further compensation under the state law.

(2) Section 303(c)(1), SSA, requires each state to make its UC records available to the Railroad Retirement Board, and to furnish such copies of its UC records to the Railroad Retirement Board as the Board deems necessary for its purposes.

(3) Section 303(d)(1), SSA, requires each state UC agency, for purposes of determining an individual's eligibility benefits, or the amount of benefits, under a food stamp program established under the Food Stamp Act of 1977, to disclose, upon request, to officers and employees of the Department of Agriculture, and to officers or employees of any state food stamp agency, any of the following information contained in the records of the state UC agency—

(i) Wage information,

(ii) Whether an individual is receiving, has received, or has made application for, UC, and the amount of any such compensation being received, or to be received, by such individual,

(iii) The current (or most recent) home address of such individual, and

(iv) Whether an individual has refused an offer of employment and, if so, a description of the employment so offered and the terms, conditions, and rate of pay therefore.

(4) Section 303(e)(1), SSA, requires each state UC agency to disclose, upon request, directly to officers or employees of any state or local child support enforcement agency, any wage information contained in the records of the state UC agency for purposes of establishing and collecting child support obligations (not to include custodial parent support obligations) from, and locating, individuals owing such obligations.

(5) Section 303(h), SSA, requires each state UC agency to disclose quarterly, to the Secretary of Health and Human Services (HHS), wage information and claim information as required under Section 453(i)(1) of the SSA (establishing the National Directory of New Hires), contained in the records of such agency, for purposes of Subsections (i)(1), (i)(3), and (j) of Section 453, SSA (establishing the National Directory of New Hires and its uses for purposes of child support enforcement, Temporary Assistance to Needy Families (TANF), TANF research, administration of the earned income tax credit, and use by the Social Security Administration).

(6) Section 303(i), SSA, requires each state UC agency to disclose, upon request, to officers or employees of the Department of Housing and Urban Development (HUD) and to representatives of a public housing agency, for purposes of determining an individual's eligibility for benefits, or the amount of benefits, under a housing assistance program of HUD, any of the following information contained in the records of such state agency about any individual applying for or participating in any housing assistance program administered by HUD who has signed a consent form approved by the Secretary of HUD—

(i) Wage information, and

(ii) Whether the individual is receiving, has received, or has made application for, UC, and the amount of any such compensation being received (or to be received) by such individual.

(7) Section 3304(a)(16), Federal Unemployment Tax Act (FUTA) requires each state UC agency—

(i) To disclose, upon request, to any state or political subdivision thereof administering a TANF program funded under part A of Title IV of the SSA, wage information contained in the records of the state UC agency which is necessary (as determined by the Secretary of HHS in regulations), for

purposes of determining an individual's eligibility for TANF assistance or the amount of TANF assistance; and

(ii) To furnish to the Secretary of HHS, in accordance with that Secretary's regulations at 45 CFR 303.108, wage information (as defined at 45 CFR 303.108(a)(2)) and UC information (as defined at 45 CFR 303.108(a)(3)) contained in the records of such agency for the purposes of the National Directory of New Hires established under Section 453(i) of the SSA.

(c) Each state law must contain provisions that are interpreted and applied consistently with the requirements listed in this section.

§ 603.7 What requirements apply to subpoenas, other compulsory process, and disclosure to officials with subpoena authority?

(a) *In general.* Except as provided in paragraph (b) of this section, when a subpoena or other compulsory process is served upon a state UC agency or the state, any official or employee thereof, or any recipient of confidential UC information, which requires the production of confidential UC information or appearance for testimony upon any matter concerning such information, the state or state UC agency or recipient must file and diligently pursue a motion to quash the subpoena or other compulsory process. Only if such motion is denied by the court or other forum may the requested confidential information be disclosed, and only upon such terms as the court or forum may order, such as that the recipient protect the disclosed information and pay the state's or state UC agency's costs of disclosure.

(b) *Exceptions.* The requirement of paragraph (a) of this section to move to quash subpoenas shall not be applicable, so that disclosure is permissible, where—

(1) *Court Decision*—a subpoena or other compulsory legal process has been served and a court has previously issued a binding precedential decision that requires disclosures of this type, or

(2) *Public Official with Subpoena Authority*—UC information has been requested, with or without a subpoena, by a state or Federal government official, other than a clerk of court on behalf of a litigant, with authority to obtain such information by subpoena under state or Federal law.

§ 603.8 What are the requirements for payment of costs and program income?

(a) *In general.* Except as provided in paragraph (b) of this section, grant funds must not be used to pay any of the costs of making any disclosure. Grant funds may not be used to pay any of the costs of making any disclosures under § 603.5(e) (optional disclosure to a public official), §603.5(f) (optional disclosure to an agent or contractor of a public official), §603.5(g) (optional disclosure to BLS), or §603.5(h) (disclosure to the IRS for HCTC purposes), § 603.6(b) (mandatory disclosures for non-UC purposes), or § 603.22 (mandatory disclosure for purposes of an IEVS).

(b) *Use of grant funds permitted.* Grant funds paid to a state under Section 302(a) of the SSA may be used to pay the costs of only those disclosures necessary for proper administration of the UC program. (This may include some disclosures under § 603.5(a) (concerning public domain information), §603.5(c) (to an individual or employer), or §603.5(d) (on the basis of informed consent)). In addition, grant funds may be used to pay costs associated with a request for disclosure of UC information if not more than an incidental amount of staff time and no more than nominal processing costs are involved in making the disclosure. Finally, grant funds may be used to pay costs associated with disclosures under § 603.7(b)(1) (concerning court-ordered compliance with subpoenas) if a court has denied recovery of costs, or to pay costs associated with disclosures under § 603.7(b)(2) (to officials with subpoena authority) if the state UC agency has attempted but not been successful in obtaining reimbursement of costs.

(c) *Calculation of costs.* The costs to a state or state UC agency of processing and handling a request for disclosure of information must be calculated in accordance with the cost principles and administrative requirements of 29 CFR part 97 and Office of Management and Budget Circular No. A–87 (Revised). For the purpose of calculating such costs, any initial start-up costs incurred by the state UC agency in preparation for making the requested disclosure(s), such as computer reprogramming necessary to respond to the request, and the costs of implementing safeguards and agreements required by §§ 603.9 and 603.10, must be charged to and paid by the recipient. (Start-up costs do not include the costs to the state UC agency of obtaining, compiling, or maintaining information for its own purposes.) Postage or other delivery costs incurred in making any disclosure are part of the costs of making the disclosure. Penalty mail, as defined in 39 U.S.C. 3201(1), must not be used to transmit information being disclosed, except information disclosed for purposes of administration of state UC law. As provided in Sections 453(e)(2) and 453(g) of the SSA, the Secretary of HHS has the authority to determine what constitutes a reasonable amount for the reimbursement for disclosures under Section 303(h), SSA, and Section 3304(a)(16)(B), FUTA.

(d) *Payment of costs.* The costs to a state or state UC agency of making a disclosure of information, calculated in accordance with paragraph (c) of this section, must be paid by and collected from the recipient of the information either in advance or by way of reimbursement. If the recipient is not a public official, such costs, except for good reason (such as when the disclosure involves minimal cost) must be paid and collected in advance. For the purposes of this paragraph (d), payment in advance means full payment of all costs before or at the time the disclosed information is given in hand or sent to the recipient. The requirement of payment of costs in this paragraph is met when a state UC agency has in place a reciprocal cost agreement or arrangement with the recipient. As used in this section, *"reciprocal"* means that the relative benefits received by each are approximately equal. Payment or reimbursement of costs must include any initial start-up costs associated with making the disclosure.

(e) *Program income.* Costs paid as required by this section, and any funds generated by the disclosure of information under this part, are program income and may be used only as permitted by 29 CFR 97.25(g) (on program income). Such income may not be used to benefit a state's general fund or other program.

§ 603.9 What safeguards and security requirements apply to disclosed information?

(a) *In general.* For disclosures of confidential UC information under § 603.5(d)(2) (to a third party on the basis of informed consent); §603.5(e) (to a public official), except as provided in paragraph (d) of this section; and §603.5(f) (to an agent or contractor of a public official); or, § 603.6(b)(1) through (4), (6), and (7)(i) (as required by Federal UC law, except for disclosures to HHS under Sections 303(h), SSA, and 3304(a)(16)(B), FUTA); or § 603.22 (to a requesting agency for purposes of an IEVS), a state or state UC agency must require the recipient to safeguard the information disclosed against unauthorized access or redisclosure, as provided in paragraphs (b) and (c) of this section, and must subject the recipient to penalties provided by the state law for unauthorized disclosure of confidential information.

(b) *Safeguards to be required of recipients.* (1) The state or state UC agency must:

(i) Require the recipient to use the disclosed information only for purposes authorized by law and consistent with an agreement that meets the requirements of § 603.10;

(ii) Require the recipient to store the disclosed information in a place physically secure from access by unauthorized persons;

(iii) Require the recipient to store and process disclosed information maintained in electronic format, such as magnetic tapes or discs, in such a way that unauthorized persons cannot obtain the information by any means;

(iv) Require the recipient to undertake precautions to ensure that only authorized personnel are given access to disclosed information stored in computer systems;

(v) Require each recipient agency or entity to

(A) Instruct all personnel having access to the disclosed information about confidentiality requirements, the requirements of this subpart B, and the sanctions specified in the state law for unauthorized disclosure of information, and

(B) Sign an acknowledgment that all personnel having access to the disclosed information have been instructed in accordance with paragraph (b)(1)(v)(A) of this section and will adhere to the state's or state UC agency's confidentiality requirements and procedures which are consistent with this subpart B and the agreement required by § 603.10, and agreeing to report any infraction of these rules to the state UC agency fully and promptly,

(vi) Require the recipient to dispose of information disclosed or obtained, and any copies thereof made by the recipient agency, entity, or contractor, after the purpose for which the information is disclosed is served, except for disclosed information possessed by any court. Disposal means return of the information to the disclosing state or state UC agency or destruction of the information, as directed by the state or state UC agency. Disposal includes deletion of personal identifiers by the state or state UC agency in lieu of destruction. In any case, the information disclosed must not be retained with personal identifiers for longer than such period of time as the state or state UC agency deems appropriate on a case-by-case basis; and

(vii) Maintain a tracking system sufficient to allow an audit of compliance with the requirements of this part.

(2) In the case of disclosures made under § 603.5(d)(2) (disclosure of confidential information to a third party on the basis of informed consent), the state or state UC agency must also—

(i) Periodically audit a sample of transactions accessing information disclosed under that section to assure that the entity receiving disclosed information has on file a written release authorizing each access. The audit must ensure that the information is not being used for any unauthorized purpose;

(ii) Ensure that all employees of entities receiving access to information disclosed under § 603.5(d)(2) are subject to the same confidentiality requirements, and state criminal penalties for violation of those requirements, as are employees of the state UC agency.

(c) *Redisclosure of confidential UC information.* (1) A state or state UC agency may authorize any recipient of confidential UC information under paragraph (a) of this section (which applies to optional disclosures to public officials, to agents or contractors of a public official, and to other entities on the basis of informed consent) to redisclose information only as follows:

(i) To the individual or employer who is the subject of the information;

(ii) To an attorney or other duly authorized agent representing the individual or employer;

(iii) In any civil or criminal proceedings for or on behalf of a recipient agency or entity;

(iv) In response to a subpoena only as provided in § 603.7;

(v) To an agent or contractor of a public official only if the person redisclosing is a public official, if the redisclosure is authorized by the state law, and if the public official retains responsibility for the uses of the confidential UC information by the agent or contractor;

(vi) From one public official to another if the redisclosure is authorized by the state law;

(vii) When so authorized by Section 303(e)(5) of the SSA (redisclosure of wage information by a state or local child support enforcement agency to an agent under contract with such agency for purposes of carrying out child support enforcement) and by state law; or

(viii) When specifically authorized by a written release that meets the requirements of § 603.5(d) (permitting optional disclosure to other entities on the basis of informed consent).

(2) Information redisclosed under paragraphs (c)(1)(v) and (vi) of this section must be subject to the safeguards in paragraph (b) of this section.

(d) The requirements of this section do not apply to disclosures of UC information to a Federal agency which the Department has determined, by notice published in the **Federal Register**, to have in place safeguards adequate to satisfy the confidentiality requirement of Section 303(a)(1), SSA.

§ 603.10 What are the requirements for agreements?

(a) *Requirements.* (1) For any disclosure of confidential information under § 603.5(d)(2) (to a third party on the basis of informed consent); § 603.5(e) (to a public official), except as provided in paragraph (d) of this section; § 603.5(f) (to an agent or contractor of a public official); § 603.6(b)(1) through (4), (6), and (7)(i) (as required by Federal UC law, except to HHS under Sections 303(h), SSA, and 3304(a)(16)(B), FUTA); and § 603.22 (to a requesting agency for purposes of an IEVS), a state or state UC agency must enter into a written, enforceable agreement with any agency or entity requesting disclosure(s) of such information. The agreement must be terminable if the state or state UC agency determines that the safeguards in the agreement are not adhered to.

(2) For disclosures referred to in § 603.5(f) (to an agent or contractor of a public official), the state or state UC agency must enter into a written, enforceable agreement with the public official on whose behalf the agent or contractor will obtain information. The agreement must hold the public official responsible for ensuring that the agent or contractor complies with the safeguards of § 603.9. The agreement must be terminable if the state or state UC agency determines that the safeguards in the agreement are not adhered to.

(b) *Contents of agreement*—(1) *In general.* Any agreement required by paragraph (a) of this section must include, but need not be limited to, the following terms and conditions:

(i) A description of the specific information to be furnished and the purposes for which the information is sought;

(ii) A statement that those who request or receive information under the agreement will be limited to those with a need to access it for purposes listed in the agreement;

(iii) The methods and timing of requests for information and responses to those requests, including the format to be used;

(iv) Provision for paying the state or state UC agency for any costs of furnishing information, as required by § 603.8 (on costs);

(v) Provision for safeguarding the information disclosed, as required by § 603.9 (on safeguards); and

(vi) Provision for on-site inspections of the agency, entity, or contractor, to assure that the requirements of the state's law and the agreement or contract required by this section are being met.

(2) In the case of disclosures under § 603.5(d)(2) (to a third party on the basis of informed consent), the agreement required by paragraph (a) of this section must assure that the information will be accessed by only those entities with authorization under the individual's or employer's release, and that it may be used only for the specific purposes authorized in that release.

(c) *Breach of agreement*—(1) *In general.* If an agency, entity, or contractor, or any official, employee, or agent thereof, fails to comply with any provision of an agreement required by this section, including timely payment of the state's or state UC agency's costs billed to the agency, entity, or contractor, the agreement must be suspended, and further disclosure of information (including any disclosure being processed) to such agency, entity, or contractor is prohibited, until the state or state UC agency is satisfied that corrective action has been taken and there will be no further breach. In the absence of prompt and satisfactory corrective action, the agreement must be canceled, and the agency, entity, or contractor must be required to surrender to the state or state UC agency all confidential information (and copies thereof) obtained under the agreement which has not previously been returned to the state or state UC agency, and any other information relevant to the agreement.

(2) *Enforcement.* In addition to the actions required to be taken by paragraph (c)(1) of this section, the state or state UC agency must undertake any other action under the agreement, or under any law of the state or of the United States, to enforce the agreement and secure satisfactory corrective action or surrender of the information, and must take other remedial actions permitted under state or Federal law to effect adherence to the requirements of this subpart B, including seeking damages, penalties, and restitution as permitted under such law for any charges to granted funds and all costs incurred by the state or the state UC agency in pursuing the breach of the agreement and enforcement as required by this paragraph (c).

(d) The requirements of this section do not apply to disclosures of UC information to a Federal agency which the Department has determined, by notice published in the **Federal Register**, to have in place safeguards adequate to satisfy the confidentiality requirement of Section 303(a)(1), SSA, and an appropriate method of paying or reimbursing the state UC agency (which may involve a reciprocal cost arrangement) for costs involved in such disclosures. These determinations will be published in the **Federal Register**.

§ 603.11 How do states notify claimants and employers about the uses of their information?

(a) *Claimants.* Every claimant for compensation must be notified, at the time of application, and periodically thereafter, in what situations confidential UC information pertaining to the claimant may be requested and utilized. Notice on or attached to subsequent additional claims will satisfy the requirement for periodic notice thereafter.

(b) *Employers.* Every employer subject to a state's law must be notified in what situations wage information and other confidential information about the employer may be requested and utilized.

§ 603.12 How are the requirements of this subpart enforced?

(a) *Resolving conformity and compliance issues.* For the purposes of resolving issues of conformity and substantial compliance with the requirements set forth in subparts B and C, the provisions of paragraphs (b) (informal discussions with the Department of Labor to resolve conformity and substantial compliance issues), and (d) (Secretary of Labor's hearing and decision on conformity and substantial compliance) of 20 CFR 601.5 apply.

(b) *Conformity and substantial compliance.* Whenever the Secretary of Labor, after reasonable notice and opportunity for a hearing to the state UC agency of a state, finds that the state law fails to conform, or that the state or state UC agency fails to comply substantially, with:

(1) The requirements of Title III, SSA, implemented in subparts B and C, the Secretary of Labor shall notify the Governor of the state and such state UC agency that further payments for the administration of the state UC law will not be made to the state until the Secretary of Labor is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, the Department of Labor shall make no further payments to such state.

(2) The FUTA requirements implemented in this subpart B, the Secretary of Labor shall make no certification under that section to the Secretary of the Treasury for such state as of October 31 of the 12-month period for which such finding is made.

Subpart C—Mandatory Disclosure for Income and Eligibility Verification System (IEVS)

§ 603.20 What is the purpose and scope of this subpart?

(a) *Purpose.* Subpart C implements Section 303(f) of the SSA. Section 303(f) requires states to have in effect an income and eligibility verification system, which meets the requirements of Section 1137 of the SSA, under which information is requested and exchanged for the purpose of verifying eligibility for, and the amount of, benefits available under several federally assisted programs, including the federal-state UC program.

(b) *Scope.* This subpart C applies only to a state UC agency.

(Note to §603.20: Although not implemented in this part, Section 1137(a)(1) of the SSA provides that each state must require claimants for compensation to furnish to the state UC agency their Social Security account numbers, as a condition of eligibility for compensation, and further requires states to utilize such account numbers in the administration of the state UC laws. Section 1137(a)(3) of the SSA further provides that employers must make quarterly wage reports to a state UC agency, or an alternative agency, for use in verifying eligibility for, and the amount of, benefits. Section 1137(d)(1) of the SSA provides that each state must require claimants for compensation, as a condition of eligibility, to declare in writing, under penalty of perjury, whether the individual is a citizen or national of the United States, and, if not, that the individual is in a satisfactory immigration status. Other provisions of Section 1137(d) of the SSA not implemented in this part require the states to obtain, and individuals to furnish, information which shows immigration status, and require the states to verify immigration status with the Bureau of Citizenship and Immigration Services (formerly the Immigration and Naturalization Service).

§ 603.21 What definitions apply to this subpart?

For the purposes of this subpart C, requesting agency means:

(a) Temporary Assistance to Needy Families Agency—Any state or local agency charged with the responsibility of administering a program funded under part A of Title IV of the SSA.

(b) Medicaid Agency—Any state or local agency charged with the responsibility of administering the provisions of the Medicaid program under a state plan approved under Title XIX of the SSA.

(c) Food Stamp Agency—Any state or local agency charged with the responsibility of administering the provisions of the Food Stamp Program under the Food Stamp Act of 1977.

(d) Other SSA Programs Agency—Any state or local agency charged with the responsibility of administering a program under a state plan approved under Title I, X, XIV, or XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the SSA.

(e) Child Support Enforcement Agency—Any state or local child support enforcement agency charged with the responsibility of enforcing child support obligations under a plan approved under part D of Title IV of the SSA.

(f) HHS—The Secretary of HHS in establishing or verifying eligibility or benefit amounts under Titles II (Old-Age, Survivors, and Disability Insurance Benefits) and XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the SSA.

§ 603.22 What information must state UC agencies disclose for purposes of an IEVS?

(a) *Disclosure of information.* Each state UC agency must disclose, upon request, to any requesting agency, as defined in § 603.21, that has entered into an agreement required by § 603.10, wage information (as defined at § 603.2(k)) and claim information (as defined at § 603.2(a)) contained in the records of such state UC agency.

(b) *Format.* The state UC agency must adhere to standardized formats established by the Secretary of HHS (in consultation with the Secretary of Agriculture) and set forth in 42 CFR 435.960 (concerning standardized formats for furnishing and obtaining information to verify income and eligibility).

§ 603.23 What information must state UC agencies obtain from other agencies, and crossmatch with wage information, for purposes of an IEVS?

(a) *Crossmatch with information from requesting agencies.* Each state UC agency must obtain such information from the Social Security Administration and any requesting agency as may be needed in verifying eligibility for, and the amount of, compensation payable under the state UC law.

(b) *Crossmatch of wage and benefit information.* The state UC agency must crossmatch quarterly wage information with UC payment information to the extent that such information is likely, as determined by the Secretary of Labor, to be productive in identifying ineligibility for benefits and preventing or discovering incorrect payments.

[FR Doc. 04–18333 Filed 8–11–04; 8:45 am]

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Federal Register

Thursday,
August 12, 2004

Part IV

Department of Labor

The Department of Labor's Records Management Program; Notice

DEPARTMENT OF LABOR

Office of the Secretary

[Secretary's Order 2–2004]

The Department of Labor's Records Management Program

1. Purpose

To delegate authority, assign responsibility, and affirm policy for an internal records management program that ensures that officials and employees make, preserve and efficiently manage records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Department, in order to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the Department's activities. The Records Management Program is intended to assure compliance with legal requirements to create and maintain accurate and complete records of the Department's functions and activities and to ensure the authorized, timely, and appropriate disposition of documentary materials that are no longer needed to conduct business.

2. Authorities and Directives Affected

a. *Authorities.* This Order is issued pursuant to the Federal Records Act of 1950, as amended (44 U.S.C. 21, 29, 31, 33 and 35); 29 U.S.C. 551, *et seq.*; 5 U.S.C. 301; Reorganization Plan Number 6 (1950); the National Archives and Records Administration (NARA), Records Management Regulations, 36 CFR parts 1220, 1228, 1230, 1232 and 1234; General Services Administration (Creation, Maintenance and Use of Records), 41 CFR part 102–193; and the Guidance Memorandum, dated March 19, 2002, issued jointly by the National Archives and Records Administration and the Department of Justice on "Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Records Related to Homeland Security."

b. *Directives Affected.* This Order does not affect the authorities and responsibilities assigned by any other Secretary's Order, unless otherwise expressly so provided in this or another Order.

3. Background

The Federal Records Act of 1950 (section 506 (b)) requires that the Head of each Federal agency establish and maintain an active Records Management Program. Records Management is an active continuing program for controlling the creation, maintenance, use and disposition of records within an organization to document and transact its business. The program functions and responsibilities have been performed under the direction of the Office of the Assistant Secretary for Administration and Management for many years in the absence of a formal Secretary's Order. Accordingly, this Order formally delegates authority and assigns responsibility for oversight and implementation of the Records Management functions of the Department.

4. Scope

This Order is applicable Department-wide.

5. Policy

It is the Department's policy to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Department and designed to furnish the information necessary to protect the legal and financial rights of the Department and of persons directly affected by Departmental activities. The Department will effectively and efficiently manage records throughout their life cycle. The Department will comply with all related Federal statutes and regulations. All scheduled records shall be destroyed, retired, or transferred, only as prescribed in approved record retention schedules.

Among other things, good recordkeeping contributes to the smooth operation of agency programs by making the information needed for decisionmaking and operations readily available. It further provides information useful to successor officials and staff for background and analysis, facilitating transitions between Administrations. It ensures accountability and protects records from inappropriate and unauthorized access and destruction.

6. Responsibility

a. The Assistant Secretary for Administration and Management is delegated authority and assigned responsibility for:

(1) Establishing, administering, and managing the Department's Records Management Program;

(2) Periodically evaluating the Records Management Programs relating to records creation and recordkeeping requirements, maintenance and use of records, and records disposition. These evaluations shall include periodic monitoring of the staff determinations of the record status of documentary materials in all media, and implementation of these decisions, in compliance with National Archives and Records Administration regulations; and

(3) Assigning a Departmental Records Officer who will manage the day-to-day administration and management of all matters related to the Department's Records Management Program. The Departmental Records Officer shall be responsible for all matters related to the Department's Records Management Program and will coordinate with the National Archives and Records Administration.

b. The Solicitor of Labor is delegated authority and assigned responsibility for providing legal advice and counsel to the DOL agencies and offices on all matters arising in the administration of this Order.

c. Agency Heads are delegated authority and assigned responsibility for:

(1) Developing and implementing an effective Records Management Program within their respective organizations that is consistent with this Order and all applicable established requirements;

(2) Establishing appropriate schedules for disposition of official records within their Agency;

(3) Assigning an Agency Records Officer to coordinate with appropriate Agency officials, the management and execution of the Agency's Records Management Program. The Agency Records Officers will coordinate with the Departmental Records Officer on the submission of records disposition schedules related to the Agency's official records;

(4) Notifying the Departmental Records Officer of the name, title, office location and telephone number of the Agency Records Officer or point of contact;

(5) Ensuring that Agency staff receive adequate records management training and participate in Departmental as well as agency training and awareness activities;

(6) Identifying and appointing personnel within the Agency who will perform all applicable functions and responsibilities related to records management; and

(7) Ensuring that all employees and officials cooperate with the Agency Records Officer.

7. Reservation of Authority and Responsibility

a. The submission of reports and recommendations to the President and the Congress concerning the administration of statutory or administrative provisions is reserved to the Secretary.

b. This Secretary's Order does not affect the authorities or responsibilities of the Office of Inspector General under the Inspector General Act of 1978, as amended, or under Secretary's Order 2–90 (January 31, 1990).

8. Effective date

This Order is effective immediately.

Dated: August 5, 2004.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. 04–18441 Filed 8–11–04; 8:45 am]

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Thursday,

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Part V

The President

Executive Order 13351—Establishing an Emergency Board To Investigate a Dispute Between the Southeastern Pennsylvania Transportation Authority and Its Conductors Represented by the United Transportation Union

Federal Register
Vol. 69, No. 155
Thursday, August 12, 2004

Presidential Documents

Title 3—

The President

Executive Order 13351 of August 9, 2004

Establishing an Emergency Board To Investigate a Dispute Between the Southeastern Pennsylvania Transportation Authority and Its Conductors Represented by the United Transportation Union

A dispute exists between the Southeastern Pennsylvania Transportation Authority and its conductors represented by the United Transportation Union.

The dispute has not heretofore been adjusted under the provisions of the Railway Labor Act, as amended, 45 U.S.C. 151-188 (the "Act").

A first emergency board to investigate and report on the dispute was established on April 12, 2004, by Executive Order 13334 of April 10, 2004. The emergency board terminated upon issuance of its report. Subsequently, its recommendations were not accepted by the parties.

A party empowered by the Act has requested that the President establish a second emergency board pursuant to section 9A of the Act (45 U.S.C. 159a).

Section 9A(e) of the Act provides that the President, upon such request, shall appoint a second emergency board to investigate and report on the dispute.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States, including section 9A of the Act, it is hereby ordered as follows:

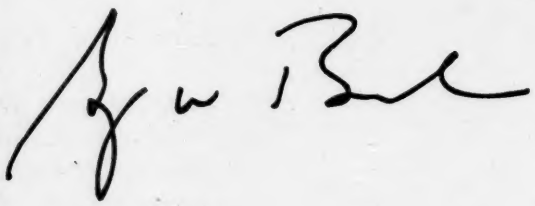
Section 1. *Establishment of Emergency Board ("Board").* There is established, effective August 10, 2004, a Board of three members to be appointed by the President to investigate and report on this dispute. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier. The Board shall perform its functions subject to the availability of funds.

Sec. 2. *Report.* Within 30 days after the creation of the Board, the parties to the dispute shall submit to the Board final offers for settlement of the dispute. Within 30 days after the submission of final offers for settlement of the dispute, the Board shall submit a report to the President setting forth its selection of the most reasonable offer.

Sec. 3. *Maintaining Conditions.* As provided by section 9A(h) of the Act, from the time a request to establish a second emergency board is made until 60 days after the Board submits its report to the President, the parties to the controversy shall make no change in the conditions out of which the dispute arose except by agreement of the parties.

Sec. 4. *Records Maintenance.* The records and files of the Board are records of the Office of the President and upon the Board's termination shall be maintained in the physical custody of the National Mediation Board.

Sec. 5. *Expiration.* The Board shall terminate upon the submission of the report provided for in section 2 of this order.



THE WHITE HOUSE,
August 9, 2004.

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Filed 8–11–04; 8:45 am]
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Coast Guard and Maritime Transportation Act of 2004 (Aug. 9, 2004; 118 Stat. 1028)

H.R. 3340/P.L. 108–294

To redesignate the facilities of the United States Postal Service located at 7715 and 7748 S. Cottage Grove Avenue in Chicago, Illinois, as the "James E. Worsham Post Office" and the "James E. Worsham Carrier Annex Building", respectively, and for other purposes. (Aug. 9, 2004; 118 Stat. 1089)

H.R. 3463/P.L. 108–295

SUTA Dumping Prevention Act of 2004 (Aug. 9, 2004; 118 Stat. 1090)

H.R. 4222/P.L. 108–296

To designate the facility of the United States Postal Service located at 550 Nebraska Avenue in Kansas City, Kansas, as the "Newell George Post Office Building". (Aug. 9, 2004; 118 Stat. 1094)

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H.R. 4417/P.L. 108–299

To modify certain deadlines pertaining to machine-readable, tamper-resistant entry and exit documents. (Aug. 9, 2004; 118 Stat. 1100)

H.R. 4427/P.L. 108–300

To designate the facility of the United States Postal Service at 73 South Euclid Avenue in Montauk, New York, as the "Perry B. Duryea, Jr. Post Office". (Aug. 9, 2004; 118 Stat. 1101)

S. 2712/P.L. 108–301

To preserve the ability of the Federal Housing Administration to insure mortgages under sections 238 and 519 of the National Housing Act. (Aug. 9, 2004; 118 Stat. 1102)

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108th Congress

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